LGB Engineering Sdn Bhd & Ors v Rayston Resources Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02(NCC)(A)-300–02 OF 2019
LEE SWEE SENG, HADHARIAH SYED ISMAIL AND GUNALAN MUNIANDY JJCA
2 SEPTEMBER 2022

Companies and Corporations — Resolutions — Circular resolutions — Validity of resolutions — High Court declared resolutions null and void for lack of quorum — Appellants passed new resolutions to ratify previous void resolutions pursuant to s 303 of Companies Act 2016 — Respondent filed action against appellants — High Court held that new resolutions null and void — High Court granted consequential order which was not pleaded in relation to subsidiary of second appellant — Respondent was not shareholder of subsidiary of second appellant — Whether resolutions could be ratified in subsequent member's meeting properly convened — Whether resolutions had been validly ratified — Whether to allow ratification via new resolutions would be to apply s 303 of the Companies Act 2016 retrospectively — Whether High Court erred in granting consequential orders not pleaded — Whether subsidiary of second appellant was separate legal entity — Whether respondent had locus standi to seek relief against subsidiary of second appellant — Whether court should validate new resolutions as no 'substantial injustice' had been shown — Companies Act 2016 ss 303 & 582

The first appellant was the majority shareholder of the second appellant whereas the respondent was the minority shareholder. As the respondent often failed to attend the shareholders' meeting, there was a lack of quorum for the purpose of passing the company's resolution. To mitigate this problem, the first appellant had transferred one share of the second appellant to a company known as LGB Utilities Sdn Bhd ('LGB Utilities'). Due to the conduct of the first appellant in transferring the said share to LGB Utilities without first offering the share to the respondent, the respondent had filed an action in the High Court wherein the High Court ordered that the transfer was null and void for lack of quorum and consequently, any subsequent resolutions ('the resolutions') passed were also rendered null and void. Thereafter, in the subsequent shareholders' meeting, the appellants had passed new resolutions ('the impugned resolutions') to ratify the resolutions pursuant to s 303 of the newly implemented Companies Act 2016 ('the CA 2016'). Aggrieved by the conduct of the appellants, the respondent filed an action in the High Court premised on the argument that the ratification of the resolutions including those related to raising the paid-up capital of the company was against the order of the court. The High Court found in favour of the respondent and held, inter

alia, that the nullity could not be cured and that s 303 of the CA 2016 could not be used retrospectively. In the present appeal by the appellants, the issues raised were: (a) whether the resolutions could be ratified in a subsequent member's meeting properly convened; (b) whether the resolutions had been validly ratified; (c) whether to allow a ratification via the impugned resolutions would be to apply s 303 of the CA 2016 retrospectively; (d) whether the High Court erred in granting consequential orders not pleaded ('the unpleaded relief') relating to the further subscription of shares by the second appellant in the third appellant that had taken place in 2017; and (e) whether having regard to s 582 of the CA 2016 (formerly s 355 of the Companies Act 1965 ('the CA 1965')), the respondent as the minority shareholder could make out a complaint on the affairs of the second appellant as the investment holding company and that in any event the court should validate the impugned resolutions as no 'substantial injustice' had been shown.

Held, allowing the appeal with costs of RM50,000 to the appellants here and below subject to allocator:

(1) The lack of a quorum caused by the respondent was at best a procedural irregularity and not a substantive one. There was no evidence of a negotiated quorum that may have given rise to a 'deadlock right' other than the default quorum of two shareholders as provided for in the CA 1965. The respondent saw nothing wrong in staying away from the members' meeting as they saw it as their inherent and innate right as a shareholder to show their objection and what some people say was their 'deadlock right'. It sounded more like 'being able to see the speck in the other person's eye but not the log in one's own eye'. To accept the respondent's contention would be to give it undue credit and allowing the minority to benefit from its own dereliction of duty and a problem created by the minority themselves. There was no such right to begin with. The right intended was the right to receive notice of meeting and to attend meeting and the right not to be excluded from the meeting. Liberty here not to come should not be elevated to a right to stay away. More so when it was deliberately done to frustrate the other person's right to have a business decision made by a majority vote (see paras 189, 219–220 & 222).

(2) The court was of the view that life and the law were not so austere and harsh such that one was punished beyond redemption for an error that one had to live with for the rest of one's life. The principle of proportionality cuts right through all aspects of life and the law. The law was after all to promote the carrying out of commerce and business where company law was concerned and not to cripple it. The respondent had no 'deadlock right' but even if such right existed in favour of the respondent, it must not be exercised in a manner as to frustrate and cripple the decision of the majority which had not been shown to be not in the best

interest of the company. Where such a right was used to jam up and jeopardise the majority's valid business ventures, that would amount to an abuse. It would be a case of the minority causing a substantial injustice to the majority and more than that to taunt and trip the majority in the tyranny of the minority (see paras 75 & 193).

(3) The respondent failed to show how they had suffered any substantial injustice, particularly in the context of the incontrovertible fact of a super majority shareholding had by the first appellant in the second appellant. The increase in the paid-up capital through the conversion of advances into shares were the normal and ordinary steps to be taken by a company in need of funds for investment. The respondent as the minority shareholder had not shown how any substantial injustice had been caused to it if the exercise of share subscription was carried out. It could choose not to subscribe to the shares and no question would and could be asked by the majority. Of course, the minority would have to correspondingly accept the fact that the shareholding would be diluted by not so subscribing to its entitlement (see paras 178 & 191).

(4) The court agreed with the appellants that the true legal position was that a nullity may be curable depending on the type of nullity that was involved in the case. In law a pre-emptive right was a right of priority or of first preference. It did not create a right in the property itself which in this case was the share wrongfully allotted to the third party. It was merely a right of first choice. It was therefore waivable even if it was a statutory right provided it was not a public right but specifically given to the protection of a class of individuals in their private capacity. The rule was that if a particular right was waivable, it was curable by adoption or ratification. What was required was that the second appellant must attempt to ratify it the right way by following the procedure in place for holding a properly convened members' meeting minus the third party ie, LGB Utilities. This the second appellant did, and the impugned resolutions were carried out (see paras 72, 82–83 & 91).

(5) The issue of a lack of quorum through the deliberate absence of the respondent could be cured through the device of a members' circular resolution made possible under s 303 of the CA 2016. In the present case, the lack of quorum was cured and validated by the passing of the impugned resolutions. The courts would not generally intervene where a matter complained of could be rectified and validated by means of a meeting properly convened so that the impediment was removed. The only time when such a cure could not be done was when the act sought to be cured was illegal or ultra vires. In the present case, the act sought to be cured was not illegal or ultra vires (see paras 200, 209, 211 & 224).

(6) To avail oneself of the new mechanism of having a members' circular resolution in place of a physical meeting was not to apply the CA 2016

retrospectively but rather to apply it to facts as existing at the time when the CA 2016 came into force. In the present case, it was only after the CA 2016 had come into force that s 303 was used to pass a members' written resolution with respect to facts already in existence. There was nothing amiss or unlawful with respect to applying s 303 of the CA 2016 with respect to facts already in existence. Therefore, the court found that the High Court had erred when it misconstrued the effect of s 303 by concluding that it was being applied retrospectively and that it had interfered with the respondent's 'substantive rights' (see paras 159, 161, 164 & 223).

(7) The unpleaded relief was not connected to a shareholders' resolution involving the previous offending shareholder ie, LGB Utilities, but instead the product of a subsequent event arising from a loan granted by the first appellant to the second appellant to subscribe for further shares in 2017 in the third appellant to meet its funding requirements. The respondent was in effect seeking reliefs which had the effect of challenging the affairs of the third appellant, of which the respondent was not a shareholder. The respondent had no locus to complain, much less to seek the reliefs extending to a subsidiary of the second appellant. A company and its subsidiary were separate legal entities after all, and the court must treat them as such in the absence of fraud and there was no suggestion here of fraud being perpetrated. Otherwise, the whole concept of a company being a separate entity from its shareholders and directors would have to be completely overhauled (see paras 171–173).

[Bahasa Malaysia summary

Perayu pertama adalah pemegang saham majoriti perayu kedua manakala responden adalah pemegang saham minoriti. Oleh kerana responden sering gagal menghadiri mesyuarat pemegang saham, terdapat kekurangan kuorum untuk tujuan meluluskan resolusi syarikat. Untuk mengatasi masalah ini, perayu pertama telah memindahkan satu bahagian saham perayu kedua kepada syarikat yang dikenali sebagai LGB Utilities Sdn Bhd ('LGB Utilities'). Disebabkan tindakan perayu pertama memindahkan saham tersebut kepada LGB Utilities tanpa terlebih dahulu menawarkan saham tersebut kepada responden, responden telah memfailkan tindakan di Mahkamah Tinggi di mana Mahkamah Tinggi telah memerintahkan bahawa pemindahan tersebut terbatal dan tidak sah kerana kekurangan kuorum dan akibatnya, mana-mana resolusi berikutnya ('resolusi tersebut') yang diluluskan juga menjadi batal dan tidak sah. Selepas itu, dalam mesyuarat pemegang saham berikutnya, perayu-perayu telah meluluskan resolusi baharu ('resolusi yang dipertikaikan') untuk mengesahkan resolusi tersebut menurut s 303 Akta Syarikat 2016 yang baharu dilaksanakan ('AS 2016'). Terkilan dengan tindakan perayu-perayu, responden memfailkan saman di Mahkamah Tinggi berdasarkan hujah bahawa pengesahan resolusi tersebut termasuk yang berkaitan dengan menaikkan

modal berbayar syarikat adalah bertentangan dengan perintah mahkamah. Mahkamah Tinggi membuat keputusan yang memihak kepada responden dan memutuskan, antara lain, bahawa pembatalan tersebut tidak boleh diperbetulkan dan s 303 AS 2016 tidak boleh digunakan secara retrospektif. Dalam rayuan semasa oleh perayu-perayu, isu-isu yang dibangkitkan adalah: (a) sama ada resolusi tersebut boleh disahkan dalam mesyuarat ahli-ahli yang berikutnya yang diadakan dengan cara yang betul; (b) sama ada resolusi tersebut telah disahkan secara betul; (c) sama ada tindakan membenarkan ratifikasi melalui resolusi yang dipertikaikan adalah menggunakan s 303 AS 2016 secara retrospektif; (d) sama ada Mahkamah Tinggi terkhilaf dalam membenarkan perintah berbangkit yang tidak diplid ('relif yang tidak diplid') berkaitan dengan langganan saham tambahan oleh perayu kedua dalam perayu ketiga yang telah berlaku pada tahun 2017; dan (e) sama ada dengan mengambil kira s 582 AS 2016 (dahulunya s 355 Akta Syarikat 1965 ('AS 1965')), responden sebagai pemegang saham minoriti boleh membuat aduan mengenai hal ehwal perayu kedua sebagai syarikat pemegang pelaburan dan bahawa dalam apa jua keadaan mahkamah harus mengesahkan resolusi yang dipertikaikan kerana tiada 'ketidakadilan yang besar' telah ditunjukkan.

Diputuskan, membenarkan rayuan dengan kos sebanyak RM50,000 diberikan kepada perayu-perayu di sini dan di bawah tertakluk kepada alokatur:

(1) Kekurangan kuorum yang disebabkan oleh responden hanyalah ketidakteraturan prosedur dan bukan ketidakaturan substantif. Tiada keterangan berkenaan kuorum rundingan yang mungkin menimbulkan 'deadlock right' selain kuorum awal dua pemegang saham seperti yang diperuntukkan dalam AS 1965. Responden tidak melihat apa-apa yang salah untuk menjauhkan diri daripada mesyuarat ahli-ahli kerana mereka melihatnya sebagai hak semula jadi mereka sebagai pemegang saham untuk menunjukkan bantahan mereka dan apa yang dikatakan oleh sesetengah orang sebagai 'deadlock right' mereka. Bunyinya lebih seperti 'being able to see the speck in the other person's eye but not the log in one's own eye'. Untuk menerima hujahan responden adalah untuk memberikan kredit yang tidak wajar dan membenarkan minoriti mendapat manfaat daripada pengabaian tugasnya sendiri dan masalah yang dicipta oleh minoriti itu sendiri. Sebenarnya tidak ada hak sedemikian yang diberikan. Hak yang dimaksudkan ialah hak untuk menerima notis mesyuarat dan untuk menghadiri mesyuarat dan hak untuk tidak dikecualikan daripada mesyuarat. Kebebasan di sini untuk tidak datang tidak seharusnya dinaikkan kepada hak untuk menjauhkan diri. Lebih-lebih lagi apabila ia sengaja dilakukan untuk menggagalkan hak orang lain untuk membuat keputusan perniagaan dengan undi majoriti (lihat perenggan 189, 219–220 & 222).

(2) Mahkamah berpandangan bahawa kehidupan dan undang-undang tidak

begitu tegas dan keras sehinggakan seseorang itu dihukum melampaui penebusan atas kesilapannya yang terpaksa dilalui sepanjang hayatnya. Prinsip berpadanan merentasi semua aspek kehidupan dan undang-undang. Fungsi undang-undang sebenarnya untuk menggalakkan pelaksanaan perdagangan dan perniagaan berkaitan dengan undang-undang syarikat dan bukan untuk melumpuhkannya. Responden tidak mempunyai 'deadlock right' tetapi jikapun responden mempunyai hak tersebut, ia tidak boleh dilaksanakan dengan cara yang boleh mengecewakan dan melumpuhkan keputusan majoriti yang tidak ditunjukkan sebagai bertentangan dengan kepentingan terbaik syarikat tersebut. Apabila hak sedemikian digunakan untuk menyekat dan menjejaskan usaha niaga perniagaan majoriti yang sah, tindakan tersebut membawa kepada penyalahgunaan. Ia akan menjadi suatu kes di mana minoriti yang menyebabkan ketidakadilan yang besar kepada majoriti dan lebih daripada itu minoriti yang telah mencemuh dan menjatuhkan majoriti dalam kezaliman minoriti (lihat perenggan 75 & 193).

(3) Responden gagal menunjukkan bagaimana mereka telah mengalami apa-apa ketidakadilan yang besar, terutamanya dalam konteks fakta yang tidak boleh dipertikaikan mengenai pegangan saham majoriti yang besar oleh perayu pertama dalam perayu kedua. Peningkatan dalam modal berbayar melalui penukaran pendahuluan kepada saham adalah langkah normal dan biasa yang perlu diambil oleh syarikat yang memerlukan dana untuk pelaburan. Responden sebagai pemegang saham minoriti tidak menunjukkan bagaimana ketidakadilan yang besar telah berlaku kepadanya jika pelaksanaan langganan saham dijalankan. Ia boleh memilih untuk tidak melanggan saham dan tiada soalan akan dan boleh ditanya oleh majoriti. Sudah tentu, minoriti perlu menerima hakikat bahawa pegangan saham akan dicairkan apabila responden tidak melanggan haknya (lihat perenggan 178 & 191).

(4) Mahkamah bersetuju dengan perayu-perayu bahawa kedudukan undang-undang yang sebenar ialah pembatalan boleh diperbetulkan bergantung kepada jenis pembatalan yang terlibat dalam sesuatu kes. Dalam undang-undang, hak beli dahulu adalah hak keutamaan atau keutamaan pertama. Ia tidak mewujudkan hak dalam harta itu sendiri yang dalam kes ini adalah saham yang diperuntukkan secara salah kepada pihak ketiga. Ia hanyalah hak pilihan pertama. Oleh itu, ia boleh diketepikan walaupun ia adalah hak berkanun dengan syarat ia bukan hak awam tetapi secara khusus diberikan kepada perlindungan kelas individu dalam kapasiti peribadi mereka. Peraturannya ialah jika hak tertentu boleh diketepikan, ia boleh diperbetulkan melalui penerimaan atau pengesahan. Apa yang diperlukan ialah perayu kedua mesti cuba mengesahkannya dengan cara yang betul dengan mengikut prosedur yang ditetapkan iaitu mengadakan mesyuarat ahli-ahli yang dipanggil dengan betul dengan mengecualikan pihak ketiga iaitu LGB Utilities.

Perkara ini telah dilakukan oleh perayu kedua, dan resolusi yang dipertikaikan telah dijalankan (lihat perenggan 72, 82–83 & 91).

(5) Isu kekurangan kuorum melalui ketidakhadiran responden yang disengajakan boleh diperbetulkan melalui cara resolusi pekeliling ahli-ahli yang ditetapkan di bawah s 303 AS 2016. Dalam kes ini, kekurangan kuorum telah dipulihkan dan disahkan dengan meluluskan resolusi yang dipertikaikan. Mahkamah secara amnya tidak akan campur tangan apabila sesuatu perkara yang diadukan boleh diperbetulkan dan disahkan melalui mesyuarat yang diadakan dengan betul supaya halangan tersebut dihapuskan. Satu-satunya masa pembetulan seperti itu tidak dapat dilakukan ialah apabila tindakan yang ingin diperbetulkan adalah tidak mengikut undang-undang atau ultra vires. Dalam kes ini, tindakan yang ingin diperbetulkan bukanlah tidak mengikut undang-undang atau ultra vires (lihat perenggan 200, 209, 211 & 224).

(6) Menggunakan mekanisme baharu iaitu dengan melaksanakan resolusi pekeliling ahli-ahli sebagai ganti mesyuarat fizikal bukanlah menggunakan AS 2016 secara retrospektif tetapi sebaliknya menggunakannya pada fakta yang sedia ada pada masa AS 2016 berkuat kuasa. Dalam kes ini, hanya selepas AS 2016 berkuat kuasa, s 303 digunakan untuk meluluskan resolusi bertulis ahli berkenaan dengan fakta yang telah wujud. Tiada apa-apa yang salah atau menyalahi undang-undang berkenaan dengan penggunaan s 303 AS 2016 berkenaan dengan fakta yang telah wujud. Oleh itu, mahkamah mendapati Mahkamah Tinggi telah terkhilaf apabila tersalah tafsir kesan s 303 dengan membuat kesimpulan bahawa ia digunakan secara retrospektif dan ia telah mengganggu 'hak substantif' responden (lihat perenggan 159, 161, 164 & 223).

(7) Relif yang tidak diplid tersebut tidak berkaitan dengan resolusi pemegang-pemegang saham yang melibatkan pemegang saham yang bersalah sebelumnya iaitu LGB Utilities, tetapi sebaliknya hasil daripada peristiwa berikutnya yang timbul daripada pinjaman yang diberikan oleh perayu pertama kepada perayu kedua untuk melanggan saham-saham tambahan pada tahun 2017 dalam perayu ketiga untuk memenuhi keperluan pembiayaannya. Responden sebenarnya telah memohon relif yang mempunyai kesan mencabar hal ehwal perayu ketiga, yang mana responden bukan pemegang saham. Responden tidak mempunyai locus untuk mengadu, lebih-lebih lagi untuk mendapatkan relif-relif yang melibatkan anak syarikat perayu kedua. Sebuah syarikat dan anak syarikatnya adalah entiti undang-undang yang berasingan, dan mahkamah mesti memperlakukan mereka sedemikian jika tiada penipuan dan di dalam kes ini, tidak ada pertikaian bahawa penipuan telah dilakukan. Jika tidak, keseluruhan konsep syarikat sebagai entiti yang berasingan daripada pemegang-pemegang saham dan

pengarah-pengarahnya perlu dirombak sepenuhnya (lihat perenggan 171–173).] A

Cases referred to

Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal [1995] 2 MLJ 770; [1995] 3 CLJ 639, CA (refd) B

Albacruz (cargo owners) v Albazero (owners) ('The Albazero') [1977] AC 774, HL (refd)

Australian Continental Resources Ltd, Re (1975) 1 ACLR 405, SC (refd)

Bamford v Bamford [1970] Ch 212; [1968] 2 All ER 655, Ch D (refd)

Bank of Tokyo Ltd v Karoon [1987] AC 45; [1986] 3 All ER 468, CA (refd) C

Bauer (M) Sdn Bhd v Jack-In Pile (M) Sdn Bhd and another appeal [2018] 4 MLJ 640; [2018] 10 CLJ 273, CA (refd)

Bentley-Stevens v Jones [1974] 1 WLR 638, Ch D (refd)

Broadway Motors Holdings Pty Ltd (in liq), Re [1986] 4 ACLC 598, SC (refd)

Browne v La Trinidad (1887) 37 Ch D 1, CA (refd) D

Chang Benety and others v Tang Kin Fei and others [2011] SGCA 59; [2012] 1 SLR 274, CA (refd)

Coal Economising Gas Co, Re, Gover's Case (1875) 1 Ch D 182, CA (refd)

Danish Mercantile Co Ltd v Beaumont [1951] Ch 680; [1951] 1 All ER 925, CA (refd) E

Ho Num Chon & Anor v Tech-Lab Scientific Sdn Bhd & Ors [2016] MLJU 451; [2016] 1 LNS 686, HC (distd)

Indira Bai v Nand Kishore (1990) 4 SCC 668; (1990) 1 SCR (Supp) 349, SC (refd)

Jigarlal Kantilal Doshi v Amanah Raya Bhd (as the administrator of the estate of the late Kantilal Prabhulal Doshi, deceased) and other appeals [2014] 6 MLJ 629, CA (refd) F

Khaw Tiew Chai v Lee Chai Seng & Ors and another appeal [2018] 12 MLJ 69, CA (refd)

Khoo Choon Yam v Gan Miew Chee @ Gan Khuan Poh & Ors [2000] 6 MLJ 20, HC (refd) G

Kong Thai Sawmill (Miri) Sdn Bhd; Kong Thai Sawmill (Miri) Sdn Bhd & Ors v Ling Beng Sung, Re [1978] 2 MLJ 227, PC (refd)

Krishan Lal v State of J and K (1994) 2 MLJ 117; (1994) 4 SCC 422, SC (refd)

MacFoy v United Africa Co Ltd [1962] AC 152, PC (refd) H

Master Ladies Tailors Organisation and Another v Minister of Labour and National Service [1950] 2 All ER 525; (1950) 66 TLR 728, KBD (refd)

National Land Finance Co-operative Society Ltd v Director General of Inland Revenue [1994] 1 MLJ 99, SC (refd)

New India Insurance Co Ltd v Shanti Misra (1976) AIR 237; (1976) SCR (2) 266, SC (refd) I

Portuguese Consolidated Copper Mines, Ltd, In Re (1889) 42 Ch D 160, Ch D (refd)

Portuguese Consolidated Copper Mines, Ltd Ex Parte Badman Ex Parte

Bosanquet, In Re (1890) 45 Ch D 16, Ch D (refd)
Pritchard (deceased), Re [1963] 1 All ER 873, CA (refd)
Quinn v Leathem [1901] AC 495, HL (refd)
Ramji Purshottam (D) by Lrs & Ors v Laxmanbhai D Kurlawala AIR 2004 SC 4010, SC (refd)
R v St Mary, Whitechapel, Inhabitants (1848) 12 QB 120, KBD (refd)
Reynolds v A-G for Nova Scotia (1896) AC 240, PC (refd)
Sazean Engineering & Construction Sdn Bhd v Bumi Bersatu Resources Sdn Bhd [2019] 1 MLJ 495, CA (refd)
Shahidan bin Shafie v Atlan Holdings Bhd and Anor [2005] MLJU 279; [2005] 3 CLJ 973, CA (refd)
Soo Boon Siong @ Saw Boon Siong v Saw Fatt Seong and Soo Hock Seang (as estate representative Soo Boon Kooi@ Saw Boon Kooy (deceased)) & Ors [2008] 1 MLJ 27, CA (refd)
Sutherland (in his capacity as liquidator of Sydney Applicances Pty Ltd (in liq)) v Robert Bosch (Australia) Pty Ltd (2000) 33 ACSR 680; [2000] NSWSC 32, SC (refd)
Tan Chee Hoe & Sdn Bhd v Code Focus Sdn Bhd [2014] 3 MLJ 301, FC (distd)
Tay Lay Soon v Kam Mah Theatre Sdn Bhd [1992] 2 MLJ 434, HC (refd)
Thio Keng Poon v Thio Syn Pyn & Ors [2010] 3 SLR 143, CA (refd)
Weldon v Winslow (1884) 13 QBD 784, CA (refd)

Legislation referred to

Companies Ordinance 1962 [AU] s 366
Companies Act 1965 (repealed by Companies Act 2016) ss 15(1), 132C, 132C(1), 132D, 132D(1), (2), (3), 147, 355
Companies Act 2016 ss 42(2), (4), 297, 298, 299, 300, 301, 302, 303, 303(2), 304, 305, 306, 306(4), 307, 308, 314, 314(2), 582, 592, Part III, Division 5, Sub-Division 2
Interpretation Acts 1948 and 1967 s 30(1)(b)
Rules of Court 2012 O 2

Appeal from: *LGB Engineering Sdn Bhd v Saiful Rais bin Shaiks Salim & Ors* [2015] 9 MLJ 349 (High Court, Kuala Lumpur)

Cyrus Das (with Logan B Sabapathy and Cheah Yi Huan) (Logan Sabapathy & Co) for the appellant.
Christopher Leong Sau Foo (with Calvin Wong Wai Hou) (Chooi & Company + Cheang & Ariff) for the respondent.

Lee Swee Seng JCA (delivering judgment of the court):

[1] The issues before this Court of Appeal arose in the context of a resolution held to be null and void by the High Court for lack of a quorum of shareholders, there being a need for at least two members to be present for the

members' or shareholders' meeting. Unfortunately, in the two-member company, the minority member chose to absent itself from the meeting as it has often been done thereafter. The majority member sought to overcome this impasse by transferring one share of its 83% equity in the company to its related entity so that the quorum quagmire may be quickly addressed.

[2] The majority misjudged the issue as any transfer would need the consent of the minority where the minority has a pre-emptive right. In an action brought by the minority member to declare the transfer of the one share null and void for breach of a particular article of the company on the pre-emptive right of the minority, the High Court agreed and so declared the transfer to be null and void and with that all resolutions sought to be passed with the presence of the new shareholder of the one share in the company were also null and void.

[3] Needless to say the majority member was frustrated with the deliberate action of the minority to stymie the valid business activities of the company including capitalising of advances made by the majority member to the company and the subscribing of new shares in the company.

[4] The majority saw a way out of this problem created by the minority by absenting itself from all shareholders' meetings with the coming into force of the Companies Act 2016 which allows for a members' circular resolution to be passed by a majority of the votes without the need for a physical meeting with its attendant need for a quorum of the two members.

[5] A fresh members' meeting was convened and as expected the minority shareholder refused to sign the resolutions which sought to ratify, inter alia, the increase in the paid-up capital of the company and the subscription of the new shares. The majority understood the resolutions to have been carried as it has an overwhelming majority and there was then no need for a physical presence of the minority to constitute the quorum of two.

[6] The minority cried foul and commenced an action by an originating summons ('OS') in the High Court to declare the fresh resolutions passed by way of a members' circular resolution to be null and void with the consequent reversal out and cancellation of all exercises taken arising out of the passing of the impugned resolutions that the High Court had struck down. That included the capitalisation exercise in the subscription of new shares in the company.

[7] The majority was again flabbergasted that the minority can literally have a majority control over the company by just putting obstacles in its valid pursuit of the company's business ventures which included the consequential capitalisation of its joint-venture subsidiary which has been awarded a project by the State government.

[8] The majority in the first appellant together with the related companies named in the OS thus appealed to this court to correct what they said was an error in the High Court where its interpretation of the relevant provisions of the Companies Act 1965 ('the CA 1965') and Companies Act 2016 ('the CA 2016') are concerned with respect to how the affairs of a company are to be conducted.

THE CORPORATE STRUCTURE AND SHAREHOLDING OF THE PARTIES

[9] Rayston Resources Sdn Bhd ('RRSB') referred to as the 'immediate minority shareholder', filed an OS in 2017 at the High Court ('subsequent OS No 51'). It is the plaintiff below and respondent in this appeal. The intitulement made reference to an earlier OS filed by the immediate minority shareholder which shall be referred to as 'earlier OS No 2'.

[10] In terms of history of the evolving disputes between the parties, one can start at 1999, when there were proceedings involving Sonny's group culminating in a consent order of March 2008 (including the need for committal enforcement proceedings) whereby the current ultimate majority shareholder, ie LGB Engineering Sdn Bhd ('LGBE') was thereafter accorded super majority shareholding control of Rayston Consortium (Butterworth) Sdn Bhd ('RCBSB'), the concession company, through an investment holding company Rayston (Butterworth) Sdn Bhd ('RBSB') where the two shareholders in it are ultimate majority shareholder LGBE and the immediate minority shareholder RRSB.

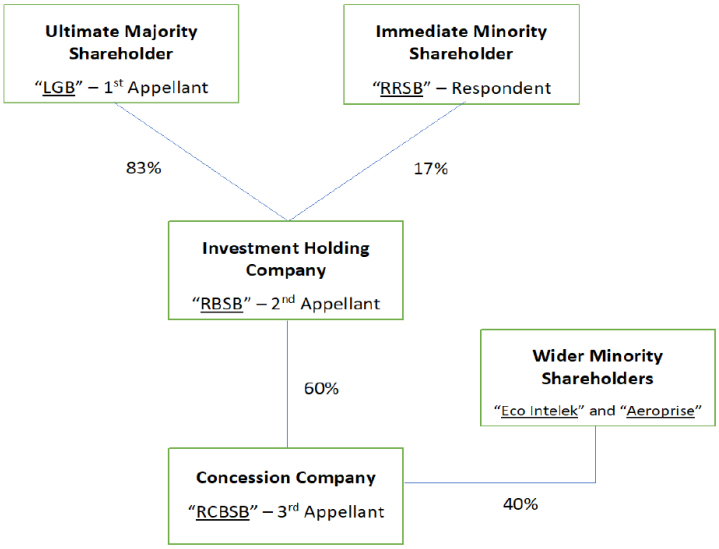
[11] LGBE, RBSB and RCBSB are the first, second and third defendants ('D1, D2 and D3') below and the first, second and third appellants in this appeal.

[12] The expression 'Sonny's group' (as set out in the affidavit evidence before the High Court) is linked to the deponent of the immediate minority shareholder (RRSB)'s affidavits namely one Dato' Sonny Cheah Lai Shin. The immediate minority shareholder and the wider minority shareholders ie Eco Intelek and Aeroprise are described as members forming part of that Sonny's group

[13] The wider minority shareholders are not parties to the OS below and therefore not parties to this appeal. The only parties to this appeal are LGBE, RBSB and RBCSB as the first to the third appellants and RRSB as the respondent.

[14] The immediate minority shareholder as the plaintiff is also not a shareholder in concession company arising from the consent order of 2008 the ultimate majority shareholder D1 was to be accorded at least 83% of the investment holding company D2 and in turn to have control of the concession company D3. From 2014 and moving forward there was a need for funding for the critical activities and requirements of the concession company D3.

[15] The corporate structures of the various companies and how they are linked to one another and their respective shareholdings, as summarised by the appellants are as shown below:



[16] The concession company was awarded valuable concession from the State Government and that in 2014 it was clear that it needed funding moving forward. There are of course several options avail able to a concession company that needed funding for its project. It could opt for loans from banks or internal funding from shareholders either via advances or loan from shareholders or by way of increase in the share capital of the concession company via subscription of new shares issued.

[17] To meet the funding requirement, in 2015 to 2016, share subscription cum capitalisation exercise was done at the levels of both the investment holding company and the concession company (involving shareholders' resolutions at both levels).

[18] In 2017, loans were extended by ultimate majority shareholder to the investment holding company who in turn then subscribed to further shares in the concession company. There was no need for any shareholders' resolutions at the level of the investment holding company for it was just a case of its ultimate majority shareholder making advances to the investment holding company.

A BEFORE THE HIGH COURT

[19] Before the High Court on the subsequent OS No 51, it was clear that the immediate minority shareholder had been coy in not participating in coming up with funding for the concession company and neither was it interested in taking up any further shares in the investment holding company for that would require further pumping in of money into the investment holding company.

[20] They were content to remain a minority shareholder with an insignificant minority shareholding of 17% in the investment holding company. The High Court was persuaded by the immediate minority shareholder that in the earlier OS No 2 the impugned resolutions had been declared null and void and so could not be regularised or ratified by a subsequent members' meeting convened to pass the same subject matters in a fresh resolution.

[21] The immediate minority shareholder had argued that the earlier shareholders' resolutions were not only null and void for lack of quorum but also ultra vires. The ultimate majority shareholders argued that such a stand was a departure from what was previously decided in the earlier OS No 2 which was decided purely on the ground of a lack of quorum.

[22] The ultra vires challenge was mounted by the immediate minority shareholder as the plaintiff in seeking to justify that the earlier shareholders' resolutions were void for contravention of ss 132C and 132D of the CA 1965. The defendants there argued that ss 132C and 132D were something new and not intituled in the subsequent OS No 51.

[23] Even though the immediate minority shareholder has not been a shareholder of the concession company, the following sets of relief were in the subsequent OS No 51 which found favour with the High Court:

(a) *first set of relief* namely that relating to the internal affairs of the investment holding company directed at annulling the subsequent Members' Written Resolution of March 2017 that arose after the conclusion of the earlier OS No 2 (see prayers 5 of encl 1 in subsequent OS No 51);

(b) *second set of relief* that covers the following:

(i) reverse wholly the capitalisation exercise initiated from late 2014 into early 2016 at two levels namely where the investment holding company had increased its capital and whereby the investment holding company had gone on to subscribe for the consequential

capital increase in the concession company (see prayers 1, 2, 3 of encl 1 of subsequent OS No 51);

(ii) indirectly reversing wholly, the further capitalisation exercise of 2017 at one level namely where the ultimate majority shareholder lent money to the investment holding company and the investment holding company went on to subscribe for further shares in the concession company (see prayer 6 of encl 1 in subsequent OS No 51).

[24] Thus in the subsequent OS No 51 before the High Court, the High Court granted orders cancelling the subscription of shares undertaken in the periods of 2015 into 2017 in the investment holding company and by the investment holding company in the concession company.

BEFORE THE COURT OF APPEAL

[25] Before us the appellants who were the defendants in the High Court below argued that the void resolutions held to be invalid in the earlier OS No 2 on ground of a lack of quorum because of the presence of LGBU may be ratified in a subsequent members' meeting properly convened where the one share transfer to LGBU had been cancelled.

[26] It was also argued that the void resolutions could be validly ratified and was so ratified in a subsequent members' meeting in the Members' Written Resolution No 1/2017 where the physical presence of the respondent as plaintiff below was no longer required under the new s 303 of the CA 2016.

[27] It was further argued that to allow a ratification via the Members' Written Resolution No 1/2017 would not be to apply s 303 of the Companies Act 2016 retrospectively but that ratification is allowed based on pre-existing facts for so long as the acts sought to be ratified were not unlawful or ultra vires.

[28] The appellants argued that the consequential orders granted were not prayed for and the net effect of that blanket cancellation orders by the High Court in the subsequent OS No 51, was such that:

(a) no attempt made to recognise the fact that the further subscription in 2017 by the investment holding company (funded by the ultimate majority shareholder) had nothing to do with shareholders' resolutions of the investment holding company (involving participation of the offending shareholder LGBU) but instead the product of such loan from the ultimate majority shareholder; and

(b) investment holding company was thereby denied of even its historical shareholding control of the concession company with such control

A accorded instead to Sonny's group, namely, the wider minority shareholders, who were not parties to the subsequent OS No 51. Neither was the immediate minority shareholder a shareholder of the concession company.

B **[29]** Such acts by Sonny's group that included the immediate minority shareholder involved, among others, historical proceedings from 1999 and thereafter as well as the following in recent time:

(a) frustrating quorum being achieved at shareholders' meetings; and

C (b) refusing to address capital contributions on their part for the funding ultimately required by the concession company (including the failure of the wider minority shareholders to so participate in funding and subscribe in the further exercise in 2017 at the level of the concession company).

D

[30] The appellants further argued that the High Court had failed to appreciate the collateral purpose and abuse of process involving the immediate minority shareholder as well as Sonny's group who had, in the past and E thereafter, been seeking to undermine the corporate direction and affairs of both the investment holding company and the concession company (despite ultimate control had by the ultimate majority shareholder).

[31] It was finally argued that having regard to s 582 of the CA 2016 F (formerly s 355 CA 1965), the plaintiff as the immediate minority shareholder has not made out a valid complaint on the affairs of D1 as the investment holding company and that in any event the court should validate the impugned resolution as no 'substantial injustice' has been shown.

G NARRATION OF FACTS

[32] The following narration of facts not seriously disputed as culled from the submissions of the parties would be necessary for an appreciation of the H issues at hand. The parties shall be referred to as they were in the High Court as plaintiff or sometimes as the immediate minority shareholder and defendants. Where specific defendants are being referred to, they shall be called D1, D2 and D3 which are the ultimate majority shareholder, the investment holding company and the concession company respectively.

I

[33] On 3 November 2014, the Sonny's group, through its nominees at the level of board of the investment holding company, earlier allowed one share in the investment holding company held by the ultimate majority shareholder to be transferred to its connected entity LGBU (the 'impugned share transfer').

[34] However, article 1C of the articles of association of the investment holding company provided for pre-emptive rights on transfers and it contains an overriding proviso of, 'Subject to any direction to the contrary that may be given' by the investment holding company.

[35] In December 2014, that impugned share transfer was then given effect to in favour of the ultimate majority shareholder's connected entity, LGBU, with the result that quorum for shareholders meetings could be achieved in future shareholders meetings of the investment holding company in the absence of the immediate minority shareholder.

[36] In April 2015, the earlier OS No 2 was nevertheless filed by the immediate minority shareholder directed at the impugned share transfer (with reference to the said article 1C) seeking the following reliefs:

(a) declaration that the impugned share transfer was a breach of the said article 1C (because prior approval of the immediate minority shareholder was technically not obtained) and following thereto, such transfer was to be viewed as null and void;

(b) register of members of the investment holding company to be rectified or alternatively, for the ultimate majority shareholder to offer that one share to the immediate minority shareholder; and

(c) declaration that consequently all shareholders' resolutions passed at shareholders meetings of the investment holding company on 24 February 2015 and any other shareholders resolutions as may be passed at subsequent shareholders general meetings of the investment holding company where LGBU would have been present and voting in its purported capacity as shareholder of investment holding company were equally to be treated as null and void.

[37] The immediate minority shareholder advanced a case before the High Court in the earlier OS No 2 that the alleged transfer of one share of investment holding company by the ultimate majority shareholder to LGBU on or around 15 December 2014 was in breach of article 1C of the articles of association of the investment holding company.

[38] The complaint was characterised as 'straightforward'. Article 1C contained a qualified pre-emptive right. That article was breached by the ultimate majority shareholder's failure to first offer the one share to immediate minority shareholder before transferring it to LGBU.

[39] By reason of that breach of article 1C, 'LGBU was not in fact a valid member of investment holding company' and therefore 'should not have been

given the notices for the EGMs to attend, participate, debate, discuss and/or vote on the resolutions put forward at the EGMs'.

[40] Consequently, 'the EGM on 24 February 2015 and subsequent EGMs of investment holding company could not have been validly constituted and LGBU should not have participated or taken part in the EGMs. The EGMs could also not have been validly constituted for want of quorum in the absence of immediate minority shareholder'.

[41] The void resolutions on the five resolutions which were passed with the attendance of and by the votes of LGBU are as follows:

No	Date of EGM and AGM	Resolution(s)
1	24 February 2015 11am ('first EGM')	1. 'Resolved that the authorised share capital of the company (2nd Appellant) be increased from RM100,000.00 divided into 100,000 ordinary shares of RM1.00 each to RM10,000,000.00 divided into 10,000,000 ordinary shares of RM1.00 each by the creation of an additional 9,900,000 ordinary shares of RM1.00 each and these shares shall rank pari passu in all respects with the existing shares in the capital of the company (2nd Appellant)'. 2. 'Resolved that authority be given to the Directors of the company (2nd Appellant) to allot and issue shares pursuant to s 132D of the Companies Act 1965 as and when they deemed fit and proper until the conclusion of the next Annual General Meeting'.
2	24 February 2015 11.30am ('second EGM')	'That authority be and is hereby given to the company to subscribe for 5,280,000 ordinary shares of RM1.00 each in Rayston Consortium (Butterworth) Sdn Bhd ('RCBSB') (3rd Appellant) and any other additional (3rd Appellant's) shares not being taken up by the existing shareholders of RCBSB (3rd Appellant)'.
3	28 May 2015 ('third EGM')	1. 'That the transfer of one ordinary share from LGB Engineering Sdn Bhd (1st Appellant) to LGB Utilities Sdn Bhd as approved by the Board of Directors at the Board Meeting on 3 November 2014 be confirmed as a contrary direction had under art 1C with effect from 3 November 2014'. 2. 'That the proposed alterations, modification, additions or deletions to the articles of association of the company (2nd Appellant) be approved'.

No	Date of EGM and AGM	Resolution(s)
4	28 October 2015 ('AGM')	1. 'That Mr. Phang Kwai Sang, a Director of the company (2nd Appellant) who retires by rotation in accordance with Article 63C and being eligible has offered himself for re-election be and is hereby re-elected as Director of the company (2nd Appellant)'. 2. 'That Mr. Tai Kok Hong, a Director of the company (2nd Appellant) who retires by rotation in accordance with Article 63C and being eligible has offered himself for re-election be and is hereby re-elected as Director of the company [2nd Appellant]'. 3. 'That Messrs. Leslie Yap & Co., the retiring Auditors be and are hereby re-appointed as Auditors of the company to hold office until the conclusion of the next Annual General Meeting and to authorise the Directors of the company (2nd Appellant) to fix their remuneration'.
5	27 January 2016 ('fourth EGM')	'That authority be and is hereby given to the company (2nd Appellant) to subscribe for 5,279,998 ordinary shares of RM1.00 each in Rayston Consortium (Butterworth) Sdn Bhd ('RCBSB') (3rd Appellant) and any other additional (3rd Appellant)'s shares not being taken up by the existing shareholders of RCBSB (3rd Appellant)'.

[42] The above resolutions were consequentially declared as null and void by the High Court ('void resolutions').

[43] The parties entered into discussions on a stay pending appeal to the Court of Appeal culminating thereafter in a consent order on stay being recorded on 23 May 2016.

[44] On 15 November 2016, that appeal to the Court of Appeal was heard. The Court of Appeal affirmed the decision of the High Court save that it allowed aspects of the appeal that sought to impose personal liability on nominees of the ultimate majority shareholder.

[45] On 5 December 2016, the ultimate majority shareholder filed an application at the Federal Court for leave to appeal. On 8 December 2016, the ultimate majority shareholder also filed an application at the Court of Appeal

for stay and to regulate a court convened meeting of the investment holding company given the past conduct of the immediate minority shareholder.

[46] On 31 January 2017, the new CA 2016 came into force whereby Part III, Division 5, Sub-Division 2 (containing ss 297 to 308) then provided for members' written resolutions which obviated the necessity for quorum at physical shareholders meetings.

[47] On 8 December 2017, the Board of the investment holding company then resolved that a shareholders' meeting be convened to reconsider previous shareholders' resolutions of the investment holding company that were tainted with the presence of LGBU but this time, such shareholders' meeting will be without the presence of LGBU. That shareholders meeting was scheduled to be had on 2 March 2017.

[48] The ultimate majority shareholder took legal advice on the necessity of physical shareholders' meetings under that 2016 Act. On 22 February 2017, the ultimate majority shareholder then wrote to the investment holding company to request that it circulate a members' written resolution pursuant to s 303 thereof to arrest wrongful frustration of quorum at physical shareholders' meetings of investment holding company.

[49] On 23 February 2017, the investment holding company duly circulated Members' Written Resolution No 1/2017 ('the impugned written resolutions') to the ultimate majority shareholder and the immediate minority shareholder. As expected, the immediate minority shareholder wrote on 24 February 2017 to the investment holding company to object to the convening of the physical shareholders' meeting on 2 March 2017.

[50] The immediate minority shareholder expressed the view that the previous shareholders resolutions that were declared null and void by the High Court judgment in the earlier OS No 2 could not be ratified.

[51] On 27 February 2017, the investment holding company responded to the immediate minority shareholder, stating that the previous shareholders' resolutions that were the subject of the High Court judgment in the earlier OS No 2 were never held to be ultra vires or illegal.

[52] The investment holding company maintained that such previous shareholders' resolutions were merely declared null and void purely because of an absence of proper quorum given the involvement of the offending shareholder, namely, LGBU, as was the case so advanced by the immediate minority shareholder in its earlier OS No 2.

[53] On 2 March 2017, the physical shareholders' meeting of the investment holding company then could not proceed for want of quorum resulting from the immediate minority shareholder's absence.

[54] Given the immediate minority shareholder's sustained frustration of quorum, on 3 March 2017, the ultimate majority shareholder returned Members' Written Resolution No 1/2017 duly executed by it. That resolution was therefore deemed passed under the CA 2016 on that date.

[55] That Members' Written Resolution of March 2017 basically proceeded to ratify affairs of the investment holding company implemented previously in the period of February 2015 to January 2016 which not only addressed the capital increase exercise of 2015 into 2016 but also the mandatory statutory requirements on such affairs of the investment holding company including re-appointment of directors, tabling of accounts, re-appointment of auditors.

[56] The resolutions to be ratified, as set out in the impugned written resolutions which were substantially the same as the void resolutions were, amongst others, as follows:

No	Resolution	Void Resolution
1	'THAT approval be and is hereby given to RBSB (2nd Appellant) with effect from 24 February 2015 to increase its Authorised Share Capital from RM100,000.00 divided into 100,000 ordinary shares of RM1.00 each to RM10,000,000.00 divided into 10,000,000 ordinary shares of RM1.00 each by the creation of an additional 9,900,000 ordinary shares of RM1.00 each and these shares shall rank pari passu in all respects with the existing shares in the capital of the company (2nd Appellant)'.	First EGM
2	'THAT authority be and is hereby given to the Directors of the company (2nd Appellant) with effect from 24 February 2015 to allot and issue shares pursuant to s 132D of the Companies Act 1965 as and when they deemed fit and proper until the conclusion of the next Annual General Meeting'.	First EGM

No	Resolution	Void Resolution
3	'THAT authority be and is hereby given to the company (2nd Appellant) with effect from 24 February 2015 to subscribe for 5,280,000 ordinary shares of RM1.00 each in Rayston Consortium (Butterworth) Sdn Bhd ('RCBSB') (3rd Appellant) and any other additional RCBSB's shares not being taken up by the existing shareholders of RCBSB (3rd Appellant)'.	Second EGM
4	'THAT contrary direction be and is hereby given under art 1C of the articles of association of the company (2nd Appellant) with effect from 3 November 2014 for the transfer of one ordinary share from LGBE to LGB Utilities Sdn Bhd'.	Third EGM
5	'THAT Mr. Phang Kwai Sang (5th Defendant in the High Court), a Director of the company (2nd Appellant) who retires by rotation in accordance with Article 63C and being eligible has offered himself for re-election be and is hereby re-elected as Director of the company (2nd Appellant) with effect from 28 October 2015'.	AGM
6	'THAT Mr. Tai Kok Hong (7th Defendant in the High Court), a Director of the company (2nd Appellant) who retires by rotation in accordance with Article 63C and being eligible has offered himself for re-election be and is hereby re-elected as Director of the company (2nd Appellant) with effect from 28 October 2015'.	AGM
7	'THAT Messrs. Leslie Yap & Co., the retiring Auditors be and are hereby re-appointed as Auditors of the company (2nd Appellant) to hold office until the conclusion of the next Annual General Meeting and to authorise the Directors of the company (2nd Appellant) to fix their remuneration'.	AGM
8	'THAT authority be and is hereby given to the company (2nd Appellant) with effect from 27 January 2016 to subscribe for 5,279,998 ordinary shares of RM1.00 each in Rayston Consortium (Butterworth) Sdn Bhd ('RCBSB') (3rd Appellant) and any other additional RCBSB's shares not being taken up by the existing shareholders of RCBSB (3rd Appellant)'.	Fourth EGM

[57] The immediate minority shareholder took umbrage at this. It was as if the ultimate majority shareholder and the investment holding company were doing the undoable and reversing the previous decision of the High Court in

the earlier OS No 2 with impunity. On 7 March 2017, the immediate minority shareholder wrote to the investment holding company, objecting to Members' Written Resolution No 1/2017 on the ground that it was, inter alia, seeking to ratify the past shareholders resolutions declared null and void by the High Court judgment in the earlier OS No 2. A B

[58] On 8 March 2017, the ultimate majority shareholder's solicitors gave notice to the immediate minority shareholder's solicitors that the pending stay and court convened meeting applications would no longer be pursued and instead be withdrawn. That withdrawal was because of the Members' Written Resolution No 1/2017 that had already been passed under the new CA 2016. C

[59] On 8 March 2017, the immediate minority shareholder's solicitors responded with the argument of ultra vires and illegality to contend that Members' Written Resolution No 1/2017 could not be acted upon. D

[60] On 9 March 2017, the immediate minority shareholder then sought to impose terms on the withdrawal by the LGB Group by inviting the Court of Appeal to bar the LGB Group from relying on Members' Written Resolution No 1/2017 as a condition to the withdrawal. E

[61] On 9 March 2017, that attempt by the immediate minority shareholder was however not entertained by the Court of Appeal. Instead, the Court of Appeal allowed the withdrawal without condition, given that all parties further recognised that the then pending application for leave to appeal to the Federal Court would also thereafter be withdrawn. F

[62] On 9 March 2017, the solicitors for the ultimate majority shareholder wrote to immediate minority shareholder's solicitors to again place on record the true and confined nature of the judgment of the High Court in the earlier OS No 2. Further, it was so stated that since the judgment of the High Court in the earlier OS No 2 neither the ultimate majority shareholder nor the investment holding company had recognised LGBU as a shareholder. Moreover, at a coming Board Meeting, the investment holding company would address the cancellation of shares previously allotted to LGBU. G H

[63] In March into April 2017, the immediate minority shareholder was also aware that the ultimate majority shareholder and the investment holding company had given effect to the judgment of High Court in the earlier OS No 2 by cancelling the impugned share transfer. I

A **[64]** On 14 March 2017, the Board of the investment holding company resolved to, inter alia, give effect to the judgment of the High Court in the earlier OS No 2 by cancelling the impugned share transfer including LGBU's other, subsequent shareholding.

B **[65]** On 17 March 2017, the investment holding company wrote to the immediate minority shareholder, referring to the Board's resolution to cancel the impugned share transfer as well as all subsequent allotments of shares to LGBU. In light of that cancellation, the investment holding company also made an offer to the immediate minority shareholder to subscribe for 897,600 C shares.

[66] Notwithstanding the cancellation of all shares transferred and allotted to LGBU, on 31 March 2017, the immediate minority shareholder responded D to the investment holding company and declined to take up the 897,600 shares.

[67] On 6 April 2017, the investment holding company wrote to the immediate minority shareholder, stating that it did not understand the purpose E of the immediate minority shareholder's complaint given the removal of the offending shareholder namely LGBU as a shareholder of the investment holding company and the Board's offer to the immediate minority shareholder of an opportunity to subscribe for shares.

F **[68]** On 24 March 2017, the immediate minority shareholder's solicitors themselves wrote to the solicitors for the ultimate majority shareholder to ask whether the application for leave to appeal to the Federal Court would be withdrawn.

G **[69]** On 3 March 2017, the immediate minority shareholder's solicitors wrote to the solicitors for the ultimate majority shareholder, indicating that they had no objections to a withdrawal with no order as to costs. On 21 April 2017, the solicitors for the ultimate majority shareholder responded, stating H that they had instructions to withdraw the leave application without prejudice to a submission on costs.

[70] On 9 May 2017, the ultimate majority shareholder withdrew the application with no order as to costs.

I **[71]** On 13 June 2017, the respondent as the plaintiff below, filed the subsequent OS No 51 seeking the following reliefs:

1. That D2 cancel and/or reverse D2's allotment of 5,280,000 ordinary shares of RM1.00 or any part thereof each to D1 and/or any other parties pursuant to D2's

resolution passed at its Extraordinary General Meeting on 24 February 2015 at 11.00 a.m. and that the share register of D2, the books and records of D2 and all and any documents and records recording the same in whatsoever manner be rectified accordingly;

2. That D2 cancel and/or reverse its subscription of 5,279,998 ordinary shares of RM1.00 each in D3 pursuant to D2's resolutions passed at its Extraordinary General Meetings on 24 February 2015 and 27 January 2016 and that the share register of D2, the books and records of D2 and all and any documents and records recording the same in whatsoever manner be rectified accordingly;

3. That D3 cancel and/or reverse the D's allotment of 5,279,998 ordinary shares of RM1.00 each to D2 and that the share registers of D2 and D3, the books and records of D2 and D3 and all and any documents and records recording the same in whatsoever manner be rectified accordingly;

4. That D2 cancel and/or reverse the following resolutions passed at D2's Extraordinary General Meeting on 28 May 2015:

(i) The confirmation of the transfer of one ordinary share or RM1.00 each from the D1 to LGB Utilities Sdn. Bhd. as a contrary direction under art 1C of D2's articles of association; and

(ii) The Proposed Amendments to D2's articles of association.

5. That the Members' Written Resolution No 1/2017 of D2 which was purportedly passed on 3 March 2017 and which purportedly ratified the items in paragraph 1.1 to 1.4 above, be declared invalid, null and void and shall be cancelled and/or reversed;

6. An order that all members' resolutions of D3 where D2 purportedly exercised the voting rights attached to the 5,279,998 ordinary shares of RM1.00 each in D3 from the subscription in D3 be cancelled and/or reversed and that the books and records of D2 and D3 and all and any documents and records recording the same in whatsoever manner be rectified accordingly;

...

9. Costs;

10. Such further and/or other consequential orders and relief which this Honourable Court deems fit and just.

11. That the plaintiff be at liberty to apply for any further and/or other consequential orders and relief to give effect to the orders made herein or in relation hereto.

Whether the resolutions held to be invalid in the earlier OS No 2 on ground of a lack of quorum may be ratified in a subsequent members' meeting properly convened

[72] Learned counsel for the defendants castigated the plaintiff's propositions that 'it is trite that a nullity cannot be cured' as being too broadly stated and that it does not exist as a maxim of general application at common

law or equity. We agree with the defendants that the true legal position is that a nullity may be curable depending on the type of nullity that is involved in the case.

[73] If the alleged nullity arose in judicial proceedings relating to jurisdiction and/or locus standi then it is non-curable and cannot be waived by the parties. It is after all trite that parties cannot confer jurisdiction on a court by consent in a judicial and legal proceeding where there was none to begin with, unless the statute has expressly provided for it. The same applies to statutory ultra vires.

[74] If the nullity arose in non-judicial proceedings, it is generally curable, as in private transactions eg as between shareholders in a company or parties to a contract where an error has occurred in the transaction in which event it is ordinarily remediable. In such cases it would not make business sense to say that time has frozen at the point of the error and parties cannot by waiver or by subsequently re-taking the proper steps remedy the error and ensure the transaction is completed.

[75] Life and the law are not so austere and harsh such that one is punished beyond redemption for an error that one has to live with for the rest of one's life. The principle of proportionality cuts right through all aspects of life and the law. The law is after all to promote the carrying out of commerce and business where company law is concerned and not to cripple it. It is to allow the will of the majority to prevail, appreciating that oftentimes, there may be as many different views as there are shareholders even in a private limited company such as the defendants here.

[76] We agree with learned counsel for the defendants that both *Re Pritchard (deceased)* [1963] 1 All ER 873 and *Jigarlal Kantilal Doshi v Amanah Raya Bhd (as the administrator of the estate of the late Kantilal Prabhulal Doshi, deceased) and other appeals* [2014] 6 MLJ 629 relied on by the High Court relate to commencement of judicial proceedings found to be a nullity and not to company meetings held to be a nullity.

[77] In *Re Pritchard* the issuance of an originating summons from the wrong registry (the Rules then saying that an originating summons could only be issued by the London Registry) was held to be a nullity. It was held to be non-waivable and therefore not an irregularity which could be cured by O 70 (our O 2 of the Rules of Court 2012).

[78] Likewise in *MacFoy v United Africa Co Ltd* [1962] AC 152, the Privy Council distinguished between an irregularity and a nullity. *Macfoy* was again a case relating to the commencement of judicial proceedings.

[79] The *Doshi* case relates to the commencement of judicial proceedings by a plaintiff who did not have the locus standi to do so. The plaintiff, Amanah Raya Bhd ('ARB'), was under a previous court order to obtain letters of administration of the deceased's estate. It had commenced legal proceedings on behalf the estate without complying with the court order. It later wrongly applied for probate, in lieu of letters of administration, which was accordingly set aside by the Federal Court. The ARB then sought locus standi by obtaining letters of administration pendent lite to apply ex post facto to continue the proceedings. It is trite that unlike an executor who sues under a will an administrator can only act upon obtaining grant of letters of administration. It was in that context that the Court of Appeal held that the ARB action cannot be cured, it being a nullity since there could be no relation back of the grant. The court observed as follows (at para [19]):

> In other words, the common law doctrine of relation back does not apply to give a party locus standi to actions commenced, undertaken or continued without it. *A nullity cannot be cured.* (Emphasis added.)

[80] We agree with learned counsel for the defendants that the nullity doctrine applies with a marked difference in non-judicial proceedings involving private transactions. It is especially so where the right claimed is contractual in nature and may therefore be waived by the affected party. Here the right claimed by the plaintiff in article 1C is contractual in nature, the articles of association being a contract between the shareholders inter se and the shareholders with the company.

[81] Simply put and shorn of the sophistication of statutory interpretation, the plaintiff's complaint from inception was in law a breach of contract complaint. Thus, when the transfer of the one share to a third party LGBU was declared null and void it was because the transfer was made in breach of the contract contained in the articles of association. We agree with the defendants that it was not a statutory breach.

[82] In law a pre-emptive right is a right of priority or of first preference. It is one of the hallmarks of a private limited company that a shareholder has the right not to admit new members into the company without its consent for otherwise the company may be composed and constituted differently from when it first started, much to the chagrin and even consternation of its original shareholders.

[83] It does not create a right in the property itself which in this case is the share wrongfully allotted to the third party. It is merely a right of first choice. It is therefore waivable even if it is a statutory right provided it is not a public right but specifically given to the protection of a class of individuals in their private capacity: see *Krishan Lal v State of J and K* (1994) 2 MLJ 117; (1994) 4 SCC

422; *Indira Bai v Nand Kishore* (1990) 4 SCC 668; (1990) 1 SCR (Supp) 349 *Maxwell on the Interpretation of Statutes* 12th Ed pp 328–331.

[84] We were referred by learned counsel for the defendants to the case of *Indira Bai*, where the Indian Supreme Court observed on the significance of the waivability factor as follows:

> The provision in the Act requiring a vendor to serve the notice on persons having right of pre-emption is condition of validity of transfer, and therefore a pre-emptor could waive it. ... The test to determine the nature of interest, namely, private or public is whether the right which is enunciated is the right of the party alone or of the public also in the sense that the general welfare of the society is involved. ... But if it is right of the party alone then it is capable of being abnegated either in writing or by conduct. ... Giving up such right, expressly or impliedly cannot therefore be said to involve any interest of community or public welfare so as to be in mischief of public policy.

[85] The right of waiver applies to contractual rights. A contracting party may at anytime waive any notice due to it in the same way that it could waive its rights of pre-emption on a proposed share transfer or allotment. There is nothing close to meeting the public policy requirement as the converse is true in that in a public company, there must not be any restrictions on the transfer of shares. The difference underscores the distinct difference in the rights of shareholders of a private limited company as opposed to a public company.

[86] Thus under s 15(1) of the CA 1965 it is provided that:

> A company having a share capital may be incorporated as a private company if its memorandum or articles —
>
> (a) restricts the right to transfer its shares;

[87] Likewise under s 42(2) of the CA 2016 it is provided that a private company shall restrict the transfer of its shares and under s 42(4) where a private company: (a) ceases to restrict the transfer of its shares, the Registrar shall serve a notice to the company that on such date as specified in the notice, the company ceased to be a private company.

[88] Here what was attempted by D2 was not to transfer its one share to an outsider so as to dilute the plaintiff's shareholding or to be denied the opportunity to purchase the one share but rather for D2 to divest one share it owns so that the quorum quagmire might be overcome. D2 has one share less and another of its related entity has that one share and the shareholding of the plaintiff remained the same.

[89] As the High Court in the original OS No 2 had held the transfer of the one share to be invalid, null and void, it would mean that there was no quorum at the meeting held to pass the resolutions and so the resolutions which included the increase in the paid-up capital and subscription of shares in D2 were held to be null and void.

[90] The subsequent impugned resolution which was a ratification exercise was later carried out without the transfer of the one share which remained not transferred because of the plaintiff's objection; doesn't matter why the plaintiff objected. The reason is not hard to find — it is that if the transfer was consented to by the plaintiff, then D2's quorum problem would have been effectively overcome. That to the plaintiff must not happen for then it would lose its strategic advantage of staying away from all members' meetings and thus frustrating all resolutions passed.

[91] The rule is that if a particular right is waivable, it is curable by adoption or ratification. What is required is that this time round D2 must attempt to ratify it the right way by following the procedure now in place for holding a properly convened members' meeting minus the third party LGBU. This D2 did and the impugned resolution was carried.

[92] We were referred by learned counsel for the defendants to the case of *Danish Mercantile Co Ltd v Beaumont* [1951] Ch 680; [1951] 1 All ER 925, where it was held that a defect in company proceedings in commencing a suit, amounting to a nullity in the sense of it not being authorised, could be cured by adoption and ratification by the shareholders. Jenkins LJ rejected the contention that an action brought without authority even if a nullity is one which cannot be validated by ratification, as follows (pp 687–88):

> ... the action is not properly constituted. In that sense, it is a nullity and can be stayed at any time, provided that the aggrieved defendant does not unduly delay his application; but *it is open at any time to the purported plaintiff to ratify the act of the solicitor who started the action to adopt the proceedings, to approve all that has been done in the past, and to instruct the solicitor to continue the action*. When that has been done, then, in accordance with the ordinary law of principal and agent and *in accordance with the ordinary doctrine of ratification, in my view, the defect in the proceedings as originally constituted is cured.* (Emphasis added.)

[93] We agree with learned counsel for the defendants that the above approach of ratification is eminently reasonable from a commercial standpoint in private transactions between parties and corporations. It does not involve any statutory ultra vires that cannot be waived or cured. To begin with had the plaintiff agreed to the transfer of the one share, they would not have committed an offence under the CA 1965 and to waive their pre-emption would be

completely within its right seeing that this is a case where D1 is not seeking to increase further its equity share in D2 but merely to overcome the quorum issue.

[94] By the same token, resolutions passed at a company general meeting which are invalidated because of inadequate notice can be rectified by the giving of proper notice and reconvening the meeting to adopt the same resolutions. Similarly, decisions made at a directors' meeting or shareholders' meeting which is invalidated by a lack of quorum can be reconvened with a quorum and the decisions ratified.

[95] The whole rationale behind ratification is to facilitate the business of a company to be carried out properly if there had been an inadvertent irregularity and not to frustrate it even after the irregularity has been regularised.

[96] Without doubt, the court order invalidating the earlier decisions stands as long as the invalidating factor remains. It cannot be gainsaid that there could be no ratification so long as the invalidating factor remains. It has never been the rule that the decision would continue to apply as a bar even if the invalidating factor is removed such that the company cannot later convene a shareholders' meeting with proper notice to re-consider the resolutions or the directors' meeting with a proper quorum to ratify their earlier decision.

[97] Learned counsel for the defendants also emphasised the fact that judgments of courts stand for what they actually decide on the facts that existed before the court at the time of the decision. Judgments do not stand as pronouncements on future conduct occurring under different circumstances. We were referred to *Quinn v Leathem* [1901] AC 495, where Lord Halsbury's enduring words were highlighted as follows at p 506:

> ... there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that *every judgment must be read as applicable to the particular facts proved*, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but *governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides.* I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. (Emphasis added.)

[98] Our courts have adopted the above principle as can be seen in *Tay Lay Soon v Kam Mah Theatre Sdn Bhd* [1992] 2 MLJ 434, where Edgar Joseph Jr J (later FCJ) observed, with specific reference to whether the court is constrained by the terms of a previous judgment between the same parties, as follows p 440:

> The main plank in the submission of counsel for the chargor was that an order whereby the chargor was required to authorize the purchaser to redeem the lands concerned now charged to the chargee would fall foul of the judgment of the Supreme Court aforesaid and so could not be made.
>
> *It is axiomatic that every judgment must be read as applicable to the particular facts proved*, since the generality of expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are found (*Quinn v Leathem*, *per Lord Halsbury at p 506). So, too, expressions of judges must be understood in relation to the subject matter before the court*. (Emphasis added.)

[99] It cannot be disputed that the factual basis on which the High Court in the first judgment held the resolutions to be invalid was the presence and voting of a third party shareholder whose shareholding was declared as having been obtained in breach of the company's articles of association. It was clear what was the invalidating factor on which the resolutions were invalidated. It was equally clear that resolutions were not invalidated for their content.

[100] The pertinent questions asked by learned counsel for the defendants are: Does the judgment prevent the company from rectifying the error by removing the invalidating factor? Has the judgment brought the life of the company to a standstill that it is forever precluded from passing any resolution to capitalise its subsidiary D3 which is the project company? Does the earlier judgment apply to a future scenario where the invalidating factor is absent?

[101] Learned counsel for the defendants referred us to the case of *In Re Portuguese Consolidated Copper Mines, Ltd* (1889) 42 Ch D 160 (first case) and *In Re Portuguese Consolidated Copper Mines, Ltd Ex Parte Badman Ex Parte Bosanquet* (1890) 45 Ch D 16 (second case) where allotment of shares to A and B were invalidated by the court in the first case for an inadequate quorum of the directors being present when the decision was made. Thereafter a subsequent case was brought by the company, following remedying the invalidating factor and ratifying the allotment, for recovery of the allotment money from A and B as the original allottees. It was held that the first judgment did not debar the recovery. Cotton LJ said (p 26):

> Then it is said that this court has decided that the board which purported to make the allotment was so constituted that it could not validly make the contract on behalf of the company, and that was said to be on the ground which I have mentioned, that due notice had not been sent to one of the directors that a meeting was to be held. ... I know of no rule at all which can allow us to say that the confirmation of the contract may not be made by anyone who has authority on behalf of the company to confirm that contract. Here the directors have full power to do everything on behalf of the company, which is not specially reserved to the company acting in general meeting, and, therefore, in my opinion, it is not

A necessary to show that those who confirmed or adopted this contract were the persons who were originally nominated as the persons who were to allot the shares.

[102] In *Khoo Choon Yam v Gan Miew Chee @ Gan Khuan Poh & Ors* [2000] 6 MLJ 20, Abdul Hamid Mohamed J (later CJ) acknowledged that a fresh step by re-doing the act previously invalidated in a proper way is permissible. It was a case where the resolution appointing new directors was struck down as invalid as due notice was not sent out to a board member. The learned judge held that the judgment stood on the present appointments being bad but went on to observe that it did not prevent a re-appointment of the same directors if undertaken in a proper way at p 27:

> The resolution is null and void. There is no question of ratification. *Of course, the Board or the general meeting may re-appoint them. Until they are re-appointed, the appointments are bad in law. It is the duty of the court to say so, as it now stands.* (Emphasis added.)

[103] We agree with learned counsel for the defendants that the true position is that so long as the ultra vires or invalidating factor is removed a ratification or adoption by the company at a general meeting of its shareholders of an earlier decision is possible. In *Bamford v Bamford* [1970] Ch 212; [1968] 2 All ER 655, Harman LJ made this sagacious observation at pp 237–38:

> ... It is trite law, I had thought, that if directors do acts, as they do every day, especially in private companies, which, perhaps because there is no quorum, or because their appointment was defective, or because sometimes there are no directors properly appointed at all, or because they are actuated by improper motives, they go on doing for years, carrying on the business of the company in the way in which, if properly constituted, they should carry it on, and then they find that everything has been so to speak wrongly done because it was not done by a proper board, such directors can, by making a full and frank disclosure and calling together the general body of the shareholders, obtain absolution and forgiveness of their sins; *and provided the acts are not ultra vires the company as a whole, everything will go on as if it had been done all right from the beginning. I cannot believe that that is not a commonplace of company law. It is done every day.* Of course, if the majority of the general meeting will not forgive and approve, the directors must pay for it. (Emphasis added.)

[104] That captures in gist what ratification is, after all for so long as the ultra vires or invalidating factor must not be present for there to be a valid cure by ratification. We agree and appreciate that in the present case the invalidating factor was duly removed when the new resolutions were moved and adopted by a majority in March 2017 under the new CA 2016. Following the first judgment invalidating the transfer, the one share being the invalidating factor was returned to D1 and the shareholding in the D2 was restored to its previous status of a 83:17 shareholding as between the D1 and the plaintiff. The new resolutions may be adopted under s 303 of the new CA 2016 with full

opportunity of participation by the plaintiff if they had wanted to avail themselves of the opportunity.

Whether the resolutions held to be invalid in the earlier OS No 2 on ground of a lack of quorum had been validly ratified in a subsequent members' meeting in the members' written resolution No 1/2017

[105] In the subsequent OS No 51, the plaintiff had suggested that the fresh resolutions passed were an attempt by the investment holding company to increase its stake in the concession company. We agree with the learned counsel for the defendants that this was clearly incorrect as the investment holding company was undeniably always the majority controlling shareholder, even before any of the disputes had arisen, of the concession company with a 60% share of the equity of the concession company. Any further increase in its stake would not be strategically significant nor advantageously appreciable.

[106] There is no shred of evidence referred by the immediate minority shareholder that the concession company has no need for any funds to undertake the State concession project or that it would be over-capitalised as a result of the subscription of more shares by the ultimate majority shareholder or that the capital raised had not been utilised or that it had been wrongly utilised.

[107] To put the issue of the impugned transfer in proper perspective, the March 2016 judgment of the High Court in the earlier OS No 2 basically took a strict position on article 1C with the result that the impugned share transfer to LGBU was invalidated as there was 'contravention with article 1C' with respect to the immediate minority shareholder's pre-emptive right and consequently held that the impugned share transfer was 'not a mere irregularity which can be rectified'.

[108] Learned counsel for the appellants highlighted to us that following from that position, that judgment of the High Court in the earlier OS No 2 however qualified the consequential invalidity of subsequent shareholders' resolutions of the investment holding company with express reference to only the physical participation of the invalid shareholder, namely, LGBU.

[109] Learned counsel for the defendants was at pains to emphasise that there is no dispute that in the proceedings on the earlier OS No 2; no case was advanced by the immediate minority shareholder that such subsequent shareholders' resolutions of the investment holding company were tainted by reason of ultra vires or illegality.

[110] Granted an illegal or ultra vires act cannot be rectified. In *Sazean*

Engineering & Construction Sdn Bhd v Bumi Bersatu Resources Sdn Bhd [2019] 1 MLJ 495 the Court of Appeal held that the impugned resolution which was purportedly passed by an incompetent board of directors was null and void and of no legal effect. Abang Iskandar JCA (now CJSS) further commented that 'ratification cannot extend to forgiving acts which are done against the law of the land. Such an act is beyond ratification'.

[111] The only issue raised here was the technical issue of quorum on such subsequent shareholders' resolutions that involved the presence of the offending shareholder namely LGBU.

[112] We can appreciate the defendants' argument that the judgment was merely a declaratory ruling on a conditional framework touching on merely the invalidity of the pre-emptive provisions on transfer of shares and consequent to that, the invalidity of the previous resolutions was purely on account of the presence of the offending shareholder, namely, LGBU.

[113] The immediate minority shareholder could have attended the members' meeting to raise objection as to the presence of LGBU at the meeting and to voice its objection and vote against the resolution to increase the paid-up capital of the investment holding company and to the subscription of new shares issued. It had chosen to stay away so that the investment holding company may be deprived of a quorum of two to validly convene the members' meeting.

[114] The presence of LGBU could have been cured by the plaintiff itself attending the member's meeting to raise objection on the presence of LGBU but its very attendance would resolve the problem of a lack of quorum, which problem the plaintiff was patently and purposely keen to perpetuate — much to the pain of the ultimate majority shareholder in D1.

[115] It appears rather hollow for the plaintiff to mount a second action when D1 managed to overcome the problem of a lack of quorum caused by the plaintiff by harnessing the benefit provided by the new CA 2016 in the facility of a members' circular written resolution to ratify what could not be done previously because of the problem of a lack of a quorum of two which problem could have been prevented by the attendance of the plaintiff at the meeting.

[116] It does not matter even if the plaintiff were to vote against the resolution. It has become crystal clear that the plaintiff as the immediate minority shareholder stayed away to prevent itself from being outvoted. With respect, the plaintiff had effectively weaponised its strategy of staying away from all members' meeting to stymie and stifle and if need be, to suffocate the investment holding company and with that the concession company

[117] Fortuitously for the appellants, on 31 January 2017, the new CA 2016 came into force whereby Part III, Division 5, Sub-Division 2 (containing ss 297–308) then provided for members' written resolutions which obviate the necessity for quorum at physical shareholders' meetings. This is not to say that had it not been for the new CA 2016, the investment holding company would have been stuck and 'frozen in time' forever, as it were, for lack of a quorum.

[118] The law then under the old CA 1965 as per s 150 thereto was that the member affected may always apply to the High Court to declare a one-member meeting as a valid meeting satisfying the requirement of the quorum of two and so to proceed to have a regular meeting despite the absence of the physical presence of the recalcitrant member that had deliberately refused to attend the members' meeting. It is of course time-consuming and especially when there is an appeal filed further to the order of the High Court and an attempt to stay the court-convened meeting of one shareholder.

[119] Viewed against the mischief that was sought to be addressed by the new CA 2016 and in particular ss 297 to 308, one can appreciate that the minority cannot be allowed to frustrate the majority or to check-mate its every move, much less to taunt it and send it on a merry-go-round by cunningly refusing to come for a members' meeting. At no material time was there any cogent evidence presented by the immediate minority shareholder that there was some oppressive conduct perpetrated by the ultimate majority shareholder or that the latter was acting not in the best interest of the investment holding company or that there was some collateral purpose perpetrated by the ultimate majority shareholder that is illegal or ultra vires the CA 2016.

[120] The consistent and predictable conduct of the immediate minority shareholder has been to refuse to attend the AGM of the investment holding company each time it was held so as to frustrate the investment holding company from even passing the normal company resolutions with respect to the ordinary business of an AGM such as the adoption of the audited accounts together with the reports of the Directors and of the auditors, the election of directors in place of those retiring and the appointment of auditors as required by law to be had annually.

[121] The immediate minority shareholder had stayed away from the AGM of 29 June 2017, the adjourned AGM of the investment holding company on 6 July 2017 and the further adjourned AGM of the investment holding company on 8 September 2017.

[122] We agree with learned counsel for the defendants that judicial estoppel would apply to confine the decision of the High Court in the earlier OS No 2 to declaring the transfer of the one share to LGBU null and void such that

LGBU was not eligible to attend the members' meeting to constitute a quorum of two shareholders with the ultimate majority shareholder. Therefore, any resolutions passed at that invalid meeting would be invalid.

[123] There was no basis to suggest that the previous shareholders resolutions were illegal or ultra vires, save for the question of quorum linked to the impugned share transfer. It cannot be gainsaid that the resolutions passed with respect to the increased in the share capital of investment holding company are matters that a company would be validly entitled to deliberate and decide on by way of a simple resolution with respect to additional capital it needs by way of shares issuance and subscription for it to undertake a State concession project.

[124] Clearly and of critical importance is that the resolution of a company to increase its paid-up capital through issuance of shares for its members to subscribe cannot be said to be illegal or ultra vires act, whether under the articles of association or Constitution of the company or under the law.

[125] At any rate there is no argument that the increase in share capital was not necessary or that its exercise was for a collateral purpose to dilute further the immediate minority shareholders interest in the investment holding company. With a paid-up capital of RM100,000, it was woefully under-capitalised to undertake any serious project, much less a State concession.

[126] Every opportunity was given to the ultimate minority shareholder to subscribe proportionately to its shareholding but it had chosen not to want to subscribe. Can they then be heard to complain by trumpeting that the ultimate majority shareholder cannot get the quorum it needs and so the business of the investment holding company cannot proceed forward and with that the concession company would not be able to undertake the project? The answer is an obvious 'no'.

[127] Perhaps that is what the immediate minority shareholder wants all along and so it has chosen to stay away from all members' meeting to deliberate on any resolutions and to vote accordingly. It knows that by voting against the proposed resolution for subscription of new shares, it would be out-voted and so it chose to weaponise its absence to stultify the majority by refusing to attend and thus no valid meeting could be had simply because there is no quorum of two shareholders!

[128] It is a case of it feels so 'good' to be so 'bad' in obstructing the majority by the effortless strategy of being absent from all members' meeting! There can be no greater presence felt than the absence of their presence and with that their super power of frustrating all business decisions of the investment holding company without a need to give any reason.

[129] It is a case of the minority saying that they have a right not to attend the members meeting and as such no explanation is necessary irrespective of the harm that may be caused to the company.

[130] There is nothing unjust or wrong in law to prevent the previous shareholders resolutions passed, but declared invalid by the High Court, from being reconsidered and approved by the shareholders of the investment holding company, this time without the attendance of the offending shareholder as the High Court in the Original OS No 2 had held the transfer of the one share to LGBU to be null and void.

[131] There is of course an urgent need to move forward for there is business to be done at the level of the concession company in the light of a State project it has been awarded.

[132] The plaintiff's conduct, if sanctioned by the court, would embolden minority shareholders in a company that has only two shareholders, to stay away from members' meeting and if there is a need for any funding for any project, it is the majority that would have to advance loans to the company and to take all the risks but when there is profit and dividends pay out, it has to be in the proportion of their shareholding.

[133] That cannot be right and the court would be giving the minority more powers than it actually has; in fact, powers that it does not have. The minority has to accept the reality of corporate decision making in that where parties cannot agree, the minority will have its say but the majority would have its way unless of course the decision is not in the best interest of the company in which case the remedies are available in law to the minority whether in seeking the action of oppression of minority interest or a winding up on the just and equitable grounds.

[134] No one is forcing the minority here in the plaintiff to subscribe to further issuance of shares for the purpose of increasing the paid-up capital of the investment company. The plaintiff as the minority shareholder can decide not to subscribe to the additional shares offered to it in the proportion of its existing shareholding and it must then correspondingly accept the reality of its shareholding being diluted for not wanting to ride together the risk and possible gains that come with every project, be it a State concession project or otherwise.

[135] There is nothing offensive as such about the said Members' Written Resolution No 1/2017. The subject matter of the impugned resolution includes matters like the laying of accounts and tabling of annual reports, the re-appointment of directors retiring, the appointment of auditors all of which

A are necessary to be held or else the investment holding company would have committed an offence under the CA 1965 and CA 2016. The company and its directors would have to pay the penalties imposed all because the plaintiff, who could have made up the quorum, stubbornly stayed away from it.

B **[136]** We agree with learned counsel for the defendants that there was nothing offensive of such subject matters of previous resolutions, particularly critical statutory requirements and commercial interests, being confirmed by way of a fresh resolution on the process available at that subsequent date to be ratified on such subject matters. It was a case where the Members Written Resolution C No 1/2017 was passed, in accordance with law existing at that time, to regulate the overall affairs of the investment holding company including its investments in the concession company and also covering previously effected re-appointment of directors, tabling of accounts, re-appointment of auditors, D etc.

[137] Learned counsel for the plaintiff sought to advance the flavour that several issues raised by the defendants are res judicata by virtue of such issues having been 'canvassed and argued extensively' in the earlier OS No 2. It was E submitted that such issues raised included, among others, the following: (a) issue of the super majority shareholding of the ultimate majority shareholder in investment holding company; (b) necessity of the capital increase in concession company to meet financial obligations under the concession awarded to it; and (c) collateral objective of the immediate minority F shareholder.

[138] However the issue here is with respect to the validity of the impugned Members' Written Resolution No 1/2017. It is a fresh resolution that was sought to be declared null and void by the plaintiff. The defendants are entitled G to raise all relevant issues impinging on their objections to the plaintiff's assertion that the impugned resolution is null and void. In any event, the High Court had not in fact made any finding on any of such aforementioned issues in the earlier OS No 2. Therefore, the defendants cannot be estopped from H raising those issues, particularly in defence of claims re-agitated by the plaintiff as the immediate minority shareholder.

[139] Learned counsel for the defendants further underscored that the resolutions were carried by an overwhelming majority with the plaintiff I abstaining or not participating, which they are at liberty to do. The outside party that originally participated was excluded this time and did not participate in the vote.

[140] We would hold that the new resolutions in the Members Written Resolutions No 1/2017 as voted upon by the eligible shareholders are valid in law. We are not persuaded that they should be set aside or declared as null and void.

Whether to allow a ratification via the impugned resolutions would be to apply s 303 of the Companies Act 2016 retrospectively

[141] There was also the submission by learned counsel for the plaintiff that the defendants are retrospectively applying the CA 2016 by passing a members' written resolution under s 303 of the said Act. That submission found favour with the High Court where it held that s 303 of the new CA 2016 could not be invoked to 'ratify' the previous resolutions because it would be a retrospective application of s 303 (see paras 26–27 of the judgment).

[142] With the greatest of respect to the High Court, the term it used, to wit, 'retrospectively ratify' is not quite correct. The resolutions of 2 March 2017 were actions taken after the coming into force of the new law. We agree with learned counsel for the defendants that they were new resolutions calling upon the shareholders to make a fresh decision whether to approve the capitalisation and the share allotments from the anterior date as proposed.

[143] We find merits in the defendants' submissions that the High Court failed to have regard to two factors at play in March 2017 that were not present previously. First, the shareholding that was called to vote on the new resolutions was different. It comprised only of D1 and the plaintiff on a 83:17 basis. The third party shareholder was excluded.

[144] Secondly, that the CA 2016 that came into force on 31 January 2017 made a radical change with regard to the holding of meetings of private companies with quorum requirements. It repealed the former s 147 of the CA 1965. Instead, provision was made by ss 297–303 to enable decisions to be made by written circular resolutions save for removal of a director or the auditor of the company (see s 297). The requirement is that the circulation must be made to all eligible members (see s 303(2)). The need for a physical meeting with a quorum requirement was abolished.

[145] It is clear that the new sections are remedial in nature as they remedied the cases of where company meetings could not be held because of quorum failure or quorum denial. The reality of being out-voted was obviated by staying away from the meeting to deny the majority the minimum quorum of two. Thus, there could be quorum obstruction or denial by dissentient shareholders to frustrate business of the company from being transacted such

that the company run by the majority shareholders are stultified and proposals are stalled not by an adverse vote but by quorum denial.

[146] Under the CA 1965 the remedy for the majority shareholder was to apply to court under the former s 150 for quorum dispensation. As expected the minority will invariably oppose it, leading to protracted legal battle. Meanwhile the proposed decisions are stalled and made to await the outcome of the court proceedings. The plaintiff here had engaged in such conduct by refusing attendance at shareholders meetings and denying quorum. The capitalisation of D3 the concession company could not therefore be undertaken.

[147] Learned counsel for the defendants submitted that D1 had justly invoked its rights under the new CA 2016 within a month of it coming into force to proceed with the capitalisation of D3 and the allotment of shares as enabled by the new s 303 without having to resort to a physical meeting and being denied quorum by the plaintiff.

[148] As pointed out by learned counsel for the defendants, by its letter of 22 February 2017 to the Board of the D2 the investment holding company, D1 sought circulation of the new written resolutions making specific reference to s 306(4) stating:

> As you are aware such Members Written Resolution can be passed *in accordance with the new s 306(4)* of the Companies Act 2016 without further concerns *should Rayston Resources Sdn Bhd absent itself in any further shareholder meetings called for by the company.* (Emphasis added.)

[149] We agree with learned counsel for the defendants that, in general, a remedial statutory provision must be construed 'as to give the most complete remedy which the phraseology will permit': see *Coal Economising Gas Co, Re, Gover's Case* (1875) 1 Ch D 182, p 198. As correctly submitted, the question to be asked, as a matter of construction, is whether the new provision carries any prohibition that no reliance should be placed on past events. In *Weldon v Winslow* (1884) 13 QBD 784, Brett MR said of a newly conferred right on married women to sue independently for a tort where the cause of action arose before the change in the law at p 787 as follows:

> It is said that this is a retrospective construction, because the cause of action arose before the statute came into operation; but the section does not say anything about cause of action; *it deals with bringing the action, and there is nothing in it to limit its provisions to causes of action arising after the statute came into operation*. I think, therefore, that an action brought after the statute came into operation is within the plain words of s 1, ... (Emphasis added.)

[150] As learned counsel for the defendants rightly discern, a remedial statutory provision could properly be applied to antecedent facts or events but that does not mean that the statute is being applied retrospective.

[151] It was further submitted that there has been a consistent approach on this principle. In *R v St Mary, Whitechapel, Inhabitants* (1848) 12 QB 120 at p 127, Lord Denman CJ said that a statute 'is not properly called a retrospective statute because a part of the requisites for its action is drawn from a time antecedent to its passing'.

[152] Again, in *Master Ladies Tailors Organisation and Another v Minister of Labour and National Service* [1950] 2 All ER 525; (1950) 66 TLR 728 it was observed by Sommervell LJ at p 730:

> The fact that a prospective benefit is in certain cases to be measured by or depends on antecedent facts does not necessarily ... make the provision retrospective.

[153] In *Ramji Purshottam (D) by Lrs & Ors v Laxmanbhai D Kurlawala* AIR 2004 SC 4010, the Indian Supreme Court held that it was not a retrospective application of an amending statute conferring rights on city tenants to set off water charges against outstanding rental if past charges before the coming into force of the amendment Act are invoked to exercise the set off (at paras 12–15).

[154] There was the more delicate contention that 'substantive rights' are affected by the change in the statute and therefore there must only be a prospective application of s 303. With respect that too is misplaced. The cases of *National Land Finance Co-operative Society Ltd v Director General of Inland Revenue* [1994] 1 MLJ 99, and *Bauer (M) Sdn Bhd v Jack-In Pile (M) Sdn Bhd and another appeal* [2018] 4 MLJ 640; [2018] 10 CLJ 273 were cited in support and apparently that found favour with the High Court (see para 26 of the judgment).

[155] Learned counsel for the defendants highlighted that the cases were concerned with s 30(1)(b) of the Interpretation Acts 1948 and 1967 which declares that acquired or accrued rights (not 'substantive rights') could not be affected by a repeal. In the *National Land Finance Co* case it was the right to a tax exemption and in the *Bauer* case it was the right not to make a particular type of payment. These rights are clearly identifiable as acquired rights prior to the change and repeal of the law.

[156] We agree with the defendants that, however, in the present case it is not comprehensible what is the acquired or accrued right that the plaintiff claims that cannot be taken away by the repeal of s 147 and its replacement by s 303? There could be no 'acquired right' to a quorum-based physical meeting as

provided for in the repealed s 147 as that has been abolished and replaced. Upon a change in a system by law, a party cannot complain and insist on adherence to the past system under a repealed law if there is no impediment to it obtaining its rights under the changed law: see observations in *Reynolds v A-G for Nova Scotia* (1896) AC 240 at p 244.

[157] Learned counsel for the defendants submitted rather persuasively that it is recognised that there could be no right to a matter of procedure (see *New India Insurance Co Ltd v Shanti Misra* (1976) AIR 237; (1976) SCR (2) 266) so long as the substantive right to vote on a resolution is not affected or taken away. There is no suggestion, as there cannot be, that the plaintiff's substantive right to vote on the written resolutions are in any way affected by the new s 303. The right to vote as a shareholder is an acquired right. That is not taken away by s 303.

[158] In reality, the minority had abused the liberty to stay away from a members' meeting to a substantive right to deny a quorum at a physical meeting. We agree with learned counsel for the defendants that such a stand should be considered as intolerable in law.

[159] Here there is a distinction with a discernible difference in that there is no retrospective application of s 303 in trying to give legitimacy to a written resolution that was passed in a manner prescribed by s 303 CA 2016 even before the commencement of the CA 2016. It was only after the CA 2016 had come into force that s 303 is used to pass a members' written resolution with respect to facts already in existence.

[160] Learned counsel for the defendants gave an example of a non-member attending and voting at a members' meeting held under the old CA 1965. The subject matter or action approved or passed in the resolution, not being illegal or ultra vires, could be ratified in a subsequent resolution to ratify the prior actions, this time without the offending shareholder.

[161] That kind of a retrospective effect arising out of an act of ratification does not equate to, in a case under s 303 CA 2016, a retrospective application of CA 2016. We would agree that it is still a prospective application for it was only implemented after the new CA 2016 came into force. However, there is nothing amiss or unlawful with respect to applying the new s 303 with respect to facts already in existence.

[162] We must not confuse what apparently appeared to be a retrospective application of s 303, which it is not, merely because 'ratification' by its very innate nature has a retrospective effect. 'Ratification' is after all, as explained by the learned author Priscillia PY Yap in *Company Meetings, Law and Practice in*

Malaysia (CCH Asia Pte Ltd, 2001) at p 141:

> 11–200 ... the *validation* by the company of a prior action (or decision), purportedly made on its behalf *so as to render it valid ab initio. Its effect is retrospective.*
>
> ... ratification validates the original action as from the date when it was made. The consequence is that *when a decision has been ratified it is the original action that is operative* and the act of ratification does not constitute a new decision. (Emphasis added.)

[163] With respect, the High Court ought to have appreciated that s 303 was being applied prospectively when it was invoked after the new CA 2016 came into force by new action taken under the terms and the procedure laid down in the new provision.

[164] We are thus constrained, having regard to the cogent and convincing arguments of learned counsel for the defendants, to hold that the High Court erred when it misconstrued the effect of s 303 by concluding that it was being applied retrospectively and that it had interfered with the plaintiff's 'substantive rights'.

Whether the high court erred in granting consequential orders not pleaded relating to the further subscription of shares by the investment holding company in the concession company that had taken place in 2017

[165] On 24 January 2019, the High Court, after reserving decision, granted relief to the immediate minority shareholder on the subsequent OS No 51 with the following to be noted as highlighted by learned counsel for the defendants:

(a) on 24 January 2019, the immediate minority shareholder sought for the High Court to grant further consequential orders that were not pleaded relating to the further subscription of shares by the investment holding company in the concession company that had taken place in 2017; and

(b) there was thereafter an application for stay (subject of encl 17 before the court) with the following to be noted on the subsequent events that took place thereafter on 28 May 2019:

  (i) on 28 May 2019, the High Court maintained that further consequential orders; and

  (ii) on 28 May 2019, the High Court granted a stay pending appeal.

[166] Learned counsel for the defendants was baffled by the fact that apart from the first set of relief, the second set of relief purports to nullify the previous capital contributions exercise ultimately for the concession company which begs the following questions:

(a) why is the immediate minority shareholder seeking to nullify those critical capital contributions that achieved strategic control over the valuable concession housed in the concession company; and

(b) in seeking such reversal, who then benefits other than Sonny's group (through the wider minority shareholders).

[167] On the second set of reliefs sought by the immediate minority shareholder, the case advanced by the defendants herein was that it was an undisputed fact that the immediate minority shareholder was not even a shareholder of the concession company. As such it has no locus to complain of the investment holding company subscribing to new shares in the concession company.

[168] It is for the concession company or the other wider minority shareholders to complain if they have a basis to. The wider minority shareholders holding 40% of the equity of the concession company had not raised any objection to the issuance of new shares to the investment holding company who had validly paid for these shares into the account of the concession company.

[169] It was submitted by learned counsel for the defendants that in considering the second set of reliefs sought by the immediate minority shareholder, it was critical for the High Court determining the subsequent OS No 51 that the immediate minority shareholder should not be allowed to collaterally seek and obtain relief that would have an unjust outcome whereby the critical controlling shareholding had by the investment holding company in the concession company is undermined with the result that wider minority shareholders connected to Sonny's group would be able to frustrate any subscription of new shares in the concession company.

[170] The High Court, in the subsequent OS No 51, in granting the further unpleaded relief by the immediate minority shareholder, had justified it as follows:

> The consequential orders are merely to specify the resolution that the defendants have passed pursuant to the rights attached to the impugned 5,2799,998 shares in (the second Appellant) which needs to be reversed or cancelled pursuant to any orders under prayers (6).I found merit in having the consequential orders made as it adds clarity and makes the main orders clear as to what needs to be done by the parties.

[171] With the greatest of respect, the High Court in so doing had inadvertently forgotten that such unpleaded relief was not connected to a shareholders resolution involving the previous offending shareholder, LGBU,

but instead the product of a subsequent event arising from a loan granted by the ultimate majority shareholder to the investment holding company to subscribe for further shares in 2017 in the concession company to meet its funding requirements.

[172] The immediate minority shareholder is in effect seeking reliefs which have the effect of challenging the affairs of the concession company, of which the immediate minority shareholder is not a shareholder. This the plaintiff has no locus to complain, much less to seek the reliefs extending to a subsidiary of the investment holding company in the concession company.

[173] A company and its subsidiary are separate legal entities after all and we must treat them as such in the absence of fraud and there is no suggestion here of fraud being perpetrated. Otherwise the whole concept of a company being a separate entity from its shareholders and directors would have to be completely overhauled. In *Albacruz (cargo owners) v Albazero (owners) ('The Albazero')* [1977] AC 774 at p 807 (CA) Roskill LJ described it as a fundamental principle of English law 'long established and now unchallenged by judicial decision … that each company in a group of companies (a relatively modern concept) is a separate legal entity possessed of separate legal rights and liabilities so that the rights of one company in a group cannot be exercised by another company in that group even though the ultimate benefit of the exercise of those rights would ensure beneficially to the same person or corporate body'.

[174] Robert Golf LJ in *Bank of Tokyo Ltd v Karoon* [1987] AC 45; [1986] 3 All ER 468 at p 64 cautioned the modern approach in these words:

> Counsel suggested beguilingly that it would be technical for us to distinguish between parent company and subsidiary in this context; economically, he said, they were one. But we are concerned not with economics but with law. The distinction between the two is, in law, fundamental and cannot be abridged'.

Whether having regard to s 582 of the Companies Act 2016 (formerly s 355 of the Companies Act 1965), the immediate minority shareholder can make out a complaint on the affairs of the investment holding company and that in any event the court should validate the impugned resolution as no 'substantial injustice' has been shown

[175] The complaint of the immediate minority shareholder could easily be addressed by them attending any members' meeting that the ultimate majority shareholder had tried to convene several times and there, to voice whatever may be their objections they may have to the resolutions. However, the immediate minority shareholder takes no pleasure in that. Rather they prefer to glory in their ability to ground the ultimate majority shareholder in their efforts to

capitalise the investment holding company so that the company has funds to inject into the concession company to enable it to execute its concession project.

[176] Should the court be entertaining the complaints of the immediate minority shareholder? Their action of deliberately refusing to attend any members' meeting held speaks volume of their refusal to solve a problem traceable to them — deliberately staying from any members' meeting to create a quorum failure problem. Having created the problem the immediate minority shareholder as plaintiff in the High Court below cannot be heard to trouble the court with a problem traceable to them which could easily be solved by their coming to the members' meeting to vote against the resolutions.

[177] In our understanding of company law and the CA 1965 as well as the CA 2016, that is not how a minority shareholder should strategise to frustrate the action of the majority and then run to court to cure a so-called injustice when there was no impediment or obstacle in their path to attend the members' meetings called for.

[178] The plaintiff in the court below had failed to show how they have suffered any substantial injustice, particularly in the context of the incontrovertible fact of a super majority shareholding had by the ultimate majority shareholder in D1.

[179] The whole purpose of ratification is to regularise what could be validly done but for technical non-compliance such as notice period or service of notice or a lack of quorum and the like. The law on ratification is to facilitate the business of a company that could be validly done and not to frustrate it and certainly not to foster fixation to an irregularity that could be overcome by doing a right act properly.

[180] Thus the courts have held that if a complaint could be rectified by the members internally by voting on a resolution then the court would not interfere or if the issue is already before the court and the court is satisfied that no substantial injustice would be caused to the party complain, the court would issue an order to cure the irregularity or the technical non-compliance so that what can be validly done is properly done to the satisfaction of everyone.

[181] That satisfaction is of course on the assumption that no one would take pleasure from a problem perpetuated by the complaining party in refusing to come and vote so as to prevent the resolution from being passed and the refusal to accept the reality of being out-voted.

[182] Thankfully, that self-created conundrum has been cured by Parliament

with the amendments effected to ss 298–303 of the CA 2016 and as is often said, Parliament does not act in vain. However, it would appear that the plaintiff prefers to live in the past and more alarmingly, to prevent the investment holding company from moving forward into the future where there is a State concession project to attend to and money to be made.

[183] Consistent with the autonomy given to shareholders to manage their own corporate affairs, our courts have no problem validating meetings where resolutions are sought to be passed where the party complaining could not show how they have suffered substantial injustice as a result. The curative provision for any irregularity in proceedings is found in s 582 of the CA 2016 which reads:

> (1) *No proceeding under this Act shall be invalidated by any defect irregularity* or deficiency of notice or time *unless the Court is of the opinion that substantial injustice has been* or may be caused which cannot be remedied by any order of the Court.
>
> (2) *The Court may*, if it thinks fit, *make an order declaring that the* proceeding is valid notwithstanding any such defect, irregularity or *deficiency*.
>
> (3) Without affecting the generality of subsections (1) and (2) or any other provision of this Act, where any omission, defect, error or irregularity, *including the absence of a quorum at any meeting of the company* or of the directors has occurred in the management or administration of a company whereby:
>
> (a) any breach of this Act has occurred;
>
> (b) there has been default in the observance of the constitution of the company; or
>
> (c) any proceedings at or in connection with any meeting of the company or of the directors or any assembly purporting to be such a meeting have been rendered ineffective including the failure to make or lodge any declaration of solvency under section 443, the Court:
>
> (A) may, either of its own motion or on the application of any interested person, make such order as the Court thinks fit to:
>
> (i) rectify or cause to be rectified or to negate or modify or cause to be modified the consequences in law of any such omission, defect, error or irregularity; or
>
> (ii) validate any act, matter or thing rendered or alleged to have been rendered invalid by or as a result of any such omission, defect, error or irregularity;
>
> (B) shall, before making any such order, satisfy itself that such an order would not do injustice to the company or to any member or creditor;
>
> (C) where any such order is made, may give such ancillary or consequential directions as the Court thinks fit; and
>
> (D) may determine notice or summons to be given to other persons of the intention to make any such application or of the intention to make such an order, and whether and how the notice or summons should be given or served

and whether the notice or summons should be advertised in any newspaper.

(4) The Court, whether the company is in process of being wound up or not, may extend or abridge any time for doing any act or taking any proceeding allowed or limited by this Act upon such terms, if any, as the justice of the case may require and any such extension may be ordered although the application for the same is not made until after the time originally allowed or limited. (Emphasis added.)

[184] Our Court of Appeal in *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770; [1995] 3 CLJ 639 held that the application of s 355 of the CA 1965 (the equivalent provision to s 582 of the CA 2016) is an exercise of discretion by the court, regard being had to:

... the justice of a particular case: it is not concerned with the question whether prejudice would result in the making of a validation order (seee *Re Australian Continential Resources Ltd* (1975) 1 ACLR 405).

[185] In interpreting the scope of this curative and validating provision, our Court of Appeal made reference to the case of *Re Australian Continental Resources Ltd* (1975) 1 ACLR 405 where in explaining the application of s 366 of the Australian Companies Ordinance 1962, which is in pari materia with s 355 of the CA 1965 and substantially similar to s 582 of the CA 2016, Blackburn J held:

Some argument occurred on the connotation of the word 'injustice' in A this paragraph. *In my opinion it necessarily implies a consideration of the relative gains or losses of the parties involved.* Counsel for the respondents sought to persuade me that in effect the word 'injustice' meant 'loss'. The word 'prejudice' was the one he actually used in argument, and I use it here in the sense of loss or 'harm'. The gist of his argument was that if the order proposed would cause prejudice to the company, member, or creditor in question, that in itself was enough to preclude the making of the order, without regard to the effect of the order upon the rights of any other party. *I think this construction is incorrect, and that it would make the section far less useful. In my opinion the task of the court, in complying with para (e), will not be complete merely upon its satisfying itself that the order proposed would not cause prejudice (in the sense indicated) to any person of the classes mentioned. Such an order may well do so. Prejudice is not the criterion; justice is; and justice may require that the prejudice to one party if the order were made be balanced against the respective prejudice to other parties if the order were not made*. (Emphasis added.)

[186] Powell J in the New South Wales Supreme Court in a 1986 decision in *Broadway Motors Holdings Pty Ltd (in liq), Re* [1986] 4 ACLC 598 observed as follows:

it must be shown that there is a nexus between the procedural irregularity which has occurred, and the matters of prejudice relied upon as constituting an injustice.

[187] Subsequently in another decision of the New South Wales Supreme Court in 1999 in the case of *Sutherland (in his capacity as liquidator of Sydney Applicances Pty Ltd (in liq)) v Robert Bosch (Australia) Pty Ltd* (2000) 33 ACSR 680; [2000] NSWSC 32, Santow J held that:

> The courts on occasion have taken a narrow view of the meaning of 'substantial injustice' for the purpose of s 1322 ... it was the procedural irregularity itself and not the ultimate outcome of an irregularly convened meeting which must cause the alleged substantial injustice.

[188] Then there is the 2010 decision of the Singaporean Court of Appeal in the case of *Thio Keng Poon v Thio Syn Pyn & Ors* [2010] 3 SLR 143, the Chao Hick Tin JA clarified that:

> ... it is clear that where there is a 'procedural irregularity', in the proceedings of a company, the proceeding in question will not be invalidated unless substantial injustice (that cannot be remedied by any order of the court) has been caused.
>
> ...
>
> All he has to show is that there may or could have been a different result. This possibility, however, should not be a theoretical or fanciful one. One must bear in mind the importance of operating in the realm of reality.

[189] To begin with the lack of a quorum, in this case caused by the plaintiff, is at best a procedural irregularity and not a substantive one. There was no evidence of a negotiated quorum that may have given rise to a 'deadlock right' other than the default quorum of two shareholders as provided for in the CA 1965. See the case of *Chang Benety and others v Tang Kin Fei and others* [2011] SGCA 59; [2012] 1 SLR 274.

[190] Next, we have to ask if curing the procedural irregularity would cause any substantial injustice to any person, in particular to the plaintiffs as the minority shareholder that is complaining.

[191] Whilst we can say and see that the increase in the paid-up capital through the conversion of advances into shares are in the main the normal and ordinary steps to be taken by a company in need of funds for investment, the plaintiff as the minority shareholder has not shown how any substantial injustice had been caused to it if the exercise of share subscription is carried out. It may choose not to subscribe to the shares and no question would and could be asked by the majority. Of course, the minority would have to correspondingly accept the fact that the shareholding would be diluted by not so subscribing to its entitlement. The plaintiff as a minority shareholder in the investment holding company would have realised that it cannot have the cake and eat it.

[192] Prior to the filing of the subsequent OS No 51, the judgment of the High Court in the earlier OS No 2 had already been attended to by the cancellation of the one share previously held by the offending shareholder, LGBU.

[193] Even if it be accepted for a moment that the plaintiff has a 'deadlock right', that must not be exercised in a manner as to frustrate and cripple the decision of the majority which has not been shown to be not in the best interest of the company. Where such a right is used to jam up and jeopardise the majority's valid business ventures, that would amount to an abuse. It would be a case of the minority causing a substantial injustice to the majority and more than that to taunt and trip the majority in the tyranny of the minority!

[194] The court would not allow such an abuse. To use the language of psychology, the abused of the past (for which there is no evidence here) may have become the abuser of the present and the court would have to override that so-called right in validating the subject matter in the Members' Written Resolution No 1/2017 so that the majority is not held to ransom and the minority is not allowed to ruin the investment holding company and with that the business in the State concession undertaken by the concession company.

[195] There was also the argument of learned counsel for the plaintiff that the defendants had contravened ss 132C and 132D of the CA 1965. Section 132C(1) reads as follows:

> 132C (1) Notwithstanding anything in a company's memorandum or articles, the directors shall not carry into effect any proposal or execute any transaction for —
>
> (a) the acquisition of an undertaking or property of a substantial value; or
>
> (b) the disposal of a substantial portion of the company's undertaking or property,
>
> which would materially and adversely affect the performance or financial position of the company, unless the proposal or transaction has been approved by the company in general meeting.

[196] Section 132D(1)–(3) of the CA 1965 reads:

> 132D (1) Notwithstanding anything in a company's memorandum or articles, the directors shall not, without the prior approval of the company in general meeting, exercise any power of the company to issue shares.
>
> (2) Approval for the purposes of this section may be confined to a particular exercise of that power or may apply to the exercise of that power generally; and any such approval may be unconditional or subject to conditions.
>
> (3) Any approval for the purposes of this section shall continue in force until —

(a) the conclusion of the annual general meeting commencing next after the date on which the approval was given; or

(b) the expiration of the period within which the next annual general meeting after that date is required by law to be held,

whichever is the earlier; but any approval may be previously revoked or varied by the company in general meeting.

[197] Learned counsel for the defendants alerted us to the fact that the issue of the alleged contravention of s 132D in relation to the allotment of shares was not raised in the earlier OS No 2 despite the EGM having already taken place on 24 February 2015 and mentioned throughout the proceedings in earlier OS No 2. Further the intitulement of subsequent OS No 51 made no reference to ss 132C and 132D of the CA 1965 and the reliefs pursuant to the said sections were also not pleaded.

[198] Further, the immediate minority shareholder as the plaintiff, had at no point in subsequent OS No 51 or in the appeal herein alleged an actual lack of approval amongst the shareholders, but merely alleges that the formalities of ss 132C and 132D were not complied with.

[199] As can be seen from a plain reading of both ss 132C and 132D, they are directed at the actions of directors of the company in carrying out the prohibited acts without the approval of the members at the AGM or EGM. Here the approvals were sought at D1's AGM and EGM and would have been carried but for the issue of a lack of quorum when the plaintiff chose to stay away from the meetings.

[200] The issue of a lack of quorum through the deliberate absence of the plaintiff could be cured through the device of a members' circular resolution made possible under the new CA 2016. The argument then should be on the validity of the impugned resolution that is the argument before this court on appeal.

[201] The Federal Court case of *Tan Chee Hoe & Sdn Bhd v Code Focus Sdn Bhd* [2014] 3 MLJ 301 can thus be distinguished because there, it was a clear lack of approval by the defendant company in relation to an agreement between the plaintiff company and the defendant company for the purchase of the defendant company's shares in a third-party company. The issue there was on the applicability of the proviso under s 132C and that the efficacy of the validation provision of s 355 of the CA 1965.

[202] Likewise, in *Ho Num Chon & Anor v Tech-Lab Scientific Sdn Bhd & Ors* [2016] MLJU 451; [2016] 1 LNS 686 the plaintiffs attempted to prevent

A the extraordinary general meeting of the defendant company where rights under s 132D were to be exercised. Section 355 was not raised. See also *Soo Boon Siong @ Saw Boon Siong v Saw Fatt Seong and Soo Hock Seang (as estate representative Soo Boon Kooi@ Saw Boon Kooy (deceased)) & Ors* [2008] 1 MLJ 27.

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[203] We agree with learned counsel for the defendants that the purported contraventions of ss 132C and 132D are merely procedural irregularities capable of being cured through s 355 of the CA 1965 and more so where the ultimate majority shareholder in D1 has the super majority shareholding in the C investment holding company D2.

[204] The minority cannot be allowed to thwart the plans of the majority by staying away from the members' meeting called for the purpose of discussing, deliberating and deciding on the proposed resolutions. The reality of the way D business is being run by companies is that when the crunch comes to a vote, the majority will prevail and the minority would need to warm up to that reality.

[205] The principle of majority rule in companies limited by shares has long E been established. Lord Wilberforce in an oft-quoted passage in *Re Kong Thai Sawmill (Miri) Sdn Bhd; Kong Thai Sawmill (Miri) Sdn Bhd & Ors v Ling Beng Sung* [1978] 2 MLJ 227 to the effect that, subject to their rights to bring a case in oppression, minority shareholders must be willing to accept majority rule. He observed as follows at p 229:

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> The mere fact that one or more of those managing the company possess a majority of the voting power and, in reliance upon that power, make policy or executive decisions, with which the complainant does not agree, is not enough. *Those who take interests in companies limited by shares have to accept majority rule.* It is only when majority rule passes over into rule oppressive of the minority, or in disregard of their G interests, that the section can be invoked. (Emphasis added.)

[206] At any rate in the 2018 decision of the Court of Appeal in the case of *Khaw Tiew Chai v Lee Chai Seng & Ors and another appeal* [2018] 12 MLJ 69, the Court of Appeal affirmed the decision of the High Court that recognised H powers under s 355 of the CA 1965 to regulate the issuance of shares as valid despite the non-compliance with s 132D as the rights of the existing shareholders were not affected and no prejudice was suffered or shown.

[207] Learned counsel for the plaintiff relied on the decision of the Court of I Appeal in the case of *Shahidan bin Shafie v Atlan Holdings Bhd and Anor* [2005] MLJU 279; [2005] 3 CLJ 973 where it was held that a shareholder has locus to bring an action where the matter complained of is ultra vires or illegal. However, as pointed out by learned counsel for the defendants, the plaintiff in that case had sought relief against the company of which he was a direct

shareholder where the act complained of was alleged to be ultra vires or illegal. The Court of Appeal remarked as follows at p 802 (CLJ):

> The position here is that the plaintiff seeks a declaration against a company of which he is a shareholder that the course of action it has embarked upon is unlawful ...

[208] The Court of Appeal then affirmed the principle that a shareholder, cannot bring an action in the courts to complain of an irregularity that can be cured by a vote of a company in a general meeting. In refusing the striking out of the plaintiff's action there the Court of Appeal observed as follows at p 802:

> Let me take the locus standi issue first. Locus standi in the present instance refers, of course, to threshold standing in a private law (as opposed to a public law) action. The rule of standing in private law, in respect of actions against companies is housed in what has come to be called as the rule in *Foss v Harbottle* (1843) 67 ER 190. That rule has two limbs. The first limb is not relevant to the facts of this appeal. However, the second limb is relevant. And the second limb is:
>
> > *that an individual shareholder cannot bring an action in the courts to complain of an irregularity (as distinct from an illegality) in the conduct of the company's internal affairs provided that the irregularity is one which can be cured by a vote of the company in general meeting* (per the joint judgment of the English Court of Appeal in *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] 1 All ER 354 at p 357.
>
> The point that requires to be noted at once is that illegal or ultra vires acts or omissions are not protected by the second limb. That an individual shareholder has standing to challenge illegal or ultra vires acts was settled beyond doubt ... (Emphasis added.)

[209] The infraction complained of in the lack of quorum was clearly curable and was cured and validated by the passing of the subsequent Members' Written Resolution No 1/2017 that is now declared to be null and void by the High Court. Once the quorum issue is overcome as was overcome here in the fresh members' meeting seeking to ratify and validate the previous actions of the investment holding company D2, this court would not go into the merits of the exercise which is well within the discretion and direction of the shareholders of the investment holding company in D2.

[210] It is not for this court to interfere and intervene in the decisions made at a properly convened members' meeting, whether it be an AGM or EGM. The plaintiff would prefer to prevail upon us as it did prevail upon the High Court that D2 cannot validly pass any resolution to increase its paid-up capital and to issue new shares for subscription of its members in the proportion of their shareholding.

[211] We agree with learned counsel for the defendants that a corollary to majority rule is that if a defect has taken place that can be cured by the shareholders at a general meeting, in whose hands lie the governance of the company, the courts will not act at the instance of a minority complainant as that matter is such that it can be set right by remedial action taken by the majority: see *Browne v La Trinidad* (1887) 37 Ch D 1 at p 17; *Bentley-Stevens v Jones* [1974] 1 WLR 638 at p 641.

[212] It would be stretching to incredulity for the minority shareholder to submit that time had become frozen after the first judgment was passed and that the proposed capitalisation of D3 the concession company and the new allotment of shares can never ever take place.

[213] The minority managed to prevail upon the High Court that the majority shareholder cannot take any remedial steps to cure the earlier defect and would forever be precluded from capitalising D3 the concession company or make a new allotment of shares in that regard.

[214] That proposition if upheld would literally bring the company to a standstill where funding is concerned. The plaintiff as the minority shareholder could still stay away from the members' meeting where a resolution is necessary for any loans from the banks as the paid up of D2 is only RM100,000. Or perhaps nothing would give the plaintiff greater fulfilment than to see the majority in D1 and thus the investment holding company in D2 being frustrated in their quest to raise funds to finance the business of the company in the concession company.

[215] It is tantamount to the plaintiff saying they would not be contributing anything to D2 in terms of funding and the ultimate majority shareholder in D1 would have to advance its own monies and any profits made would still be distributed in the proportion of their shareholding from the dividends to be declared! Again, that would be empowering the minority to frustrate the majority; a power that the minority does not have to begin with.

[216] Perhaps the minority in the plaintiff wants D2 to apply to the High Court each time it is stuck with no quorum and apply for directions from the court to convene a one-member meeting to have the necessary resolutions passed under the new s 314 of the CA 2016. The court may, either of its own motion or on the application of a director or a member of the company order a meeting to be called, held and conducted in any manner the court thinks fit under s 314(2) including giving a direction that one member of the company presenter in person or by proxy at the meeting shall be deemed to constitute a quorum under s 314(2). It does not matter that the result would be the same in that the same subject-matter of the issuance of shares and increase in paid-up

capital of D2 would be carried in a new resolution. It is that D2 must be made to sweat to get business done! A

[217] Again it does not make sense. It appears to be deviating from the plaintiff's original stand that a null and void resolution passed for a lack of quorum cannot be ratified. It is that even if it could be ratified the majority must apply to the High Court again to have a one-member meeting convened. B

[218] Later the plaintiff was heard to be saying that even if the ratification could be done it cannot be backdated to the original date when it was first sought to be done and the court had found it to be null and void. To the plaintiff it does not matter if monies had been paid out arising out of the increase in the paid-up capital and that shares had been subscribed and further investments made in the concession company D3. The new shares subscribed would have to be cancelled in D2. The plaintiff apparently wants to walk the high road of doing everything properly and regularly in accordance with the CA 1965 and CA 2016 and the articles of association of the company. C D

[219] The plaintiff saw nothing wrong in staying away from the members' meeting as they saw it as their inherent and innate right as a shareholder to show their objection and what some people say is their 'deadlock' right. It sounds more like being able to see the speck in the other person's eye but not the log in one's own eye. E

[220] To accept the minority's contention would be to give it undue credit and allowing the minority to benefit from its own dereliction of duty and a problem created by the minority themselves. This is not a case where certain resolutions have been written into its articles of association or found in some shareholders' agreement as being only carried with the consent of the minority as a matter of contractual right. F G

[221] Learned counsel for the plaintiff had even mounted the argument that the amendment to allow for a members' circular resolution had taken away the accrued right of the plaintiff to absent itself from shareholders' meeting and hence cannot be harnessed to overcome the infirmity and infraction arising out of a lack of a quorum of two. H

[222] There is no such right to begin with. One may have the liberty to stay away from a meeting as in no penalty will befall the absent member. The right is spoken of as the right to receive notice of meeting and to attend meeting and the right not to be excluded from the meeting. Liberty here not to come should not be elevated to a right to stay away. More so when it is deliberately done to frustrate the other person's right to have a business decision made by a majority vote. I

A **[223]** To avail oneself of the new mechanism of having a members' circular resolution in place of a physical meeting is not to apply the CA 2016 retrospectively but rather to apply it to facts as existing at the time when the CA 2016 came into force.

B **[224]** Courts would not generally intervene where a matter complained of could be rectified and validated by means of a meeting properly convened so that the impediment is removed. The only time when such a cure cannot be done is when the act sought to be cured is illegal or ultra vires. Here it is not.

C **[225]** Learned counsel for the plaintiff was then heard to be saying that any ratification has to be from the current date and not from the date of the original proposed act which had been struck down by the court. Again, that is, with respect, misconceived as a ratification and a validation under s 582 of the CA
D 2016 would be wide enough to regularise the act from the date that the act was sought to be impugned for some irregularity.

[226] In any event it does not make sense for commercial expediency not to allow such a ratification or validation. If it is not allowed then what would
E happen is that everything would have to be reversed out as affecting D2, much to the delight of the plaintiff. The new shares would have to cancelled. What then becomes of the money paid to D2 for the subscription of shares? We would say it remains as an advance to D2 because the money was sitting in D2's account before being used to subscribe for further shares in the concession
F company. There was nothing wrong with the money as no one is saying that it is a money-laundering transaction. The concession company is not complaining that money had come into its account when its issuance of new shares where subscribed by D2. The wider minority shareholders are not
G challenging the issuance of the new shares.

[227] Even if a fresh meeting is held the end result would have been the same and that was precisely what was done when a fresh meeting was held under the new procedure brought into effect with the coming into force of ss 297–308 of
H the CA 2016 with effect from 31 January 2017.

[228] It would appear that nothing gives the plaintiff greater satisfaction than to see D1 not being able to increase its paid-capital in its quest for funding to undertake its investment in the concession company. If that be the case, there
I is nothing that would placate the plaintiff as the immediate minority shareholder who seem to have the superpower to paralyse the whole company by not doing anything, in this case, not attending the members' meeting called for.

DECISION

[229] That cannot be right and is not right and this court would allow the appeal of the defendants as appellants and set aside the orders and further consequential reliefs granted by the High Court. The result is that the Members' Written Resolutions No 1/2017 are all validly passed. If necessary, this court has no hesitation in invoking its discretionary powers under s 592 of the CA 2016 to validate the resolutions contained in the Members' Written Resolution No 1/2017.

[230] The appeal is allowed with costs of RM50,000 to the appellants here and below subject to allocator.

Appeal allowed with costs of RM50,000 to appellants here and below subject to allocator.

Reported by Dzulqarnain Ab Fatar